SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 347

STANDARD OIL COMPANY OF CALIFORNIA,
APPELLANT,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

	Original	Print
Proceedings in supreme court of California	1	1
Caption.....(omitted in printing)..	1	
Record from superior court of City and County of San Francisco	2	1
Complaint	2	1
Answer	5	3
Stipulation of facts	7	4
Exhibit—Army Regulations No. 210-65	11	7
War Department Circular No. 57	11a	53
Findings of fact and conclusions of law	12	58
Judgment	14	59
Opinion, Goodell, J.	15	59
Judgment	26	67
Opinion by the court	27	68
Petition for rehearing	35	74
Order denying petition for rehearing	44	79
Petition for appeal, assignments of error, and prayer for reversal	45	79
Order allowing appeal	48	81
Bond on appeal.....(omitted in printing)..	50	
Citation and service.....(omitted in printing)..	52	
Stipulation as to transcript of record	55	82
Clerk's certificate.....(omitted in printing)..	57	
Statement of points to be relied upon and designation as to record	58	83

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1933

[fol. 1] [Caption omitted]

[fol. 2]

IN SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, DEPT. 16

No. 214,441

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, Defendant

COMPLAINT TO RECOVER MONEY

Now come the People of the State of California, plaintiff in the above entitled action, and complain against Standard Oil Company of California, a corporation, defendant in the above entitled action, and for cause of action allege:

I

That said defendant is and was at all times herein stated a corporation organized and existing under the laws of the State of California and doing business therein;

II

That during the quarter of the year beginning July 1, 1929, and ending September 30, 1929, said defendant refined, manufactured, produced and compounded in the State of California, and sold and delivered therein 67,663,270.02 gallons of motor vehicle fuel; that no part thereof was exported or sold for exportation and exported for use outside of said state, nor was any part thereof delivered under contracts entered into prior to the 14th day of May, 1923, or sold to the Government of the United States or any department thereof for official use of said government;

[fol. 3] III

That thereafter, to-wit, on or about the 22nd day of October, 1929, said defendant filed with the State Board of

Equalization of said state on a form prescribed by said state board a verified statement and report showing the total number of gallons of motor vehicle fuel refined, manufactured, produced and compounded by it within said state and sold by it therein during the quarter of the year ending September 30, 1929, and in said statement the number of said gallons was stated to be 67,663,270.02; that thereupon said State Board computed the license tax due or to become due from said defendant because of said sales so made by it and found to be due upon said statement and report the sum of $2,029,898.11, and from said amount so computed and found to be due there was allowed as a deduction the sum of $20,298.98, the same being one per cent of said sum of $2,029,898.11, and the balance due from said defendant upon and by reason of said tax after allowing said deduction was the sum of $2,009,599.13; that thereupon said Board of Equalization extended said sum of $2,009,599.13 upon a tax roll prepared and kept for the purpose, and thereafter and on or before the 30th day of October, 1929, delivered said tax roll to the State Controller of said state and said State Controller did within ten days thereafter notify said defendant that said license tax in said sum was due from it and payable to the State of California on or before November 15, 1929.

IV

That said sum of $2,009,599.13 so due to said State from said defendant as and for said license tax has not nor has any part thereof been paid to said State or to said State Controller except the sum of $2,009,586.53, leaving due and [fol. 4] unpaid the sum of $12.60.

V

That Ray L. Riley is now and was at all times herein stated the duly elected, qualified and acting State Controller of said state and U. S. Webb is now and was at all times herein stated the duly elected, qualified and acting Attorney General of said state, and that said State Controller did subsequent to the 15th day of November, 1929, request said Attorney General to commence this action.

Wherefore plaintiff prays judgment against said defendant for the said sum of $12.60, together with interest

thereon at the rate of seven per cent per annum from the 15th day of November, 1929; for a penalty in the sum of ten per cent of said amount and for the costs of this action.

People of the State of California, by U. S. Webb, Attorney General of the State of California; H. H. Linney, Deputy Attorney General of the State of California, Attorneys for the State of California.

[fol. 5] IN SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

[Title omitted]

ANSWER OF DEFENDANT—Filed April 13, 1931

Now comes Standard Oil Company of California, defendant in the above entitled action, and answering the complaint of plaintiff herein, denies and alleges as follows:

I

Defendant is a corporation organized under the laws of the State of Delaware and qualified to do business in the State of California and elsewhere.

II

Answering the allegations in paragraph II of said complaint, defendant denies, on information and belief, that no part of the motor vehicle fuel therein referred to was sold to the Government of the United States and/or any Department thereof for official use of said Government, and in this behalf defendant avers that during the period in said paragraph II mentioned, this defendant did sell and deliver 420 gallons, out of the 67,663,270.02 gallons of motor vehicle fuel therein referred to, to the Presidio Post Exchange at San Francisco, California; that at the time in said complaint mentioned said Presidio Post Exchange was, and now is, a post exchange organized and doing business pursuant to and in accordance with regulations of the War Department of the United States.

[fol. 6]

III

Answering the allegations of paragraph III thereof, defendant denies that the balance due from defendant to the

State of California by reason of the tax therein referred to was or is the sum of $2,009,599.13 or any other sum in excess of $2,009,586.53.

IV

Answering the allegations of paragraph IV thereof, defendant denies that there is due from it to the said State of California or to the State Controller the sum of $12.60, or any other sum, by reason of any of the facts set forth in said complaint.

Wherefore, defendant prays that plaintiff take nothing by this action and that defendant have its costs.

Pillsbury, Madison & Sutro, Counsel for Defendant.

Verification of the foregoing answer is hereby waived and receipt of a copy of it is hereby admitted this 13th day of April, 1931.

U. S. Webb, Attorney General of the State of California; H. H. Linney, Deputy Attorney General of the State of California, Attorneys for the State of California.

[File endorsement omitted.]

[fol. 7] IN SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

[Title omitted]

STIPULATION OF FACTS

It is hereby stipulated by and between counsel for the respective parties herein as follows:

I

The defendant is and was at all times mentioned in the complaint a corporation organized and existing under the laws of the State of Delaware, and duly qualified to do business and doing business in the State of California.

II

During the quarter of the year beginning July 1, 1929, and ending September 30, 1929, the defendant sold and delivered to the Presidio Post Exchange at the Presidio, San

Francisco, California, four hundred twenty (420) gallons of motor vehicle fuel. The tax sought to be levied thereon, at the rate of three cents (3¢) a gallon, amounts to twelve and 60/100 dollars ($12.60), which is the amount here in dispute.

[fol. 8] III

Said gasoline was carried by the defendant in barrels and by tank trucks to the Presidio Post Exchange; and in making delivery the defendant bore the expense and the risk of loss.

IV

The Presidio Post Exchange is and at all times hereinafter mentioned was a post exchange organized under and doing business pursuant to and in accordance with regulations of the War Department of the United States of America, as set forth in Army Regulations No. 210-65, dated June 29, 1929, and is modified by Circular 57 of the War Department, dated October 31, 1929. A copy of said Regulations and of said Circular are hereto attached and incorporated by reference.

V

The Presidio of San Francisco was established as a Military Post under Spanish dominion about 1776. It was continued as a Military Post by the Republic of Mexico and was ceded to the United States by the Treaty of Guadalupe Hidalgo at the conclusion of the war with Mexico. It was reserved for public purposes by Executive Order, dated November 6, 1850, afterwards modified by Executive Order, dated December 31, 1851. It has been continuously occupied by the United States Army as a Military Reservation since that time.

VI

On March 2, 1897, the real property in the City and County of San Francisco, State of California, known as "The Presidio of San Francisco", including the real property upon which the Presidio Post Exchange conducted and has conducted its business, and the place of sale and delivery of said gasoline, was, and ever since has been, held, occupied and reserved by the government of the United [fol. 9] States for military purposes and defense; and in accordance with an Act of the Legislature of the State of

California, entitled "An Act ceding to the United States of America jurisdiction over all lands within this State which have been or may hereafter be acquired by the United States for military purposes", approved March 2, 1897, a sufficient description by metes and bounds and a map and plat of such lands was filed in the office of the County Recorder of said City and County.

VII

Defendant reported said sale to the State Board of Equalization, as required by law, but has declined to pay said sum of twelve and 60/100 dollars ($12.60), claiming that said sale to the Presidio Post Exchange is exempt from taxation.

VIII

The State Board of Equalization duly audited said report and disallowed said claim for exemption from the payment of the tax upon said four hundred twenty (420) gallons of motor vehicle fuel and assessed and levied against the defendant a tax of twelve and 60/100 dollars ($12.60) thereon, which the defendant has not paid in whole or in part, the questions of the legal propriety of such disallowance and of such claim of exemption and refusal to pay such tax being presented for decision by the court herein.

IX

It is further stipulated and agreed that if said sale is not exempt, the amount of twelve and 60/100 dollars ($12.60) is a legal and valid tax against the defendant and is due to the State of California, and a penalty of one and [fols. 10 & 10½] 26/100 dollars ($1.26), representing ten per centum (10%) of the amount of said tax.

Dated: January 23rd, 1931.

U. S. Webb, Attorney General of the State of California; H. H. Linney, Deputy Attorney General of the State of California, Attorneys for the State of California. Pillsbury, Madison & Sutro, Attorneys for the Standard Oil Company of California.

EXHIBIT TO STIPULATION

(Exhibit follows)

ARMY REGULATIONS
No. 210-65

WAR DEPARTMENT,
WASHINGTON, *June 29, 1929.*

POSTS, CAMPS, AND STATIONS

EXCHANGES

	Paragraphs
SECTION I. General	1-7
II. Membership	8-15
III. Personnel	16-24
IV. Management	25-26
V. Records	27-35
VI. Credit	36-45
VII. Miscellaneous	46-66
VIII. Auditing	67-71
IX. Decisions	72-81
X. Company or detachment	82

SECTION I

GENERAL

	Paragraph
Establishment and maintenance	1
General authority and responsibility of commanding officer	2
Designation; name in which business transacted	3
Primary purposes, selling prices	4
Activities included	5
Allied recreational activities	6
Effect of change in membership and management	7

1. **Establishment and maintenance.**—*a. General.*—At each post, camp, or station the commanding officer will establish and maintain a post exchange whenever—

(1) There is a need for it.

(2) There are organizations present that desire to participate therein.

(3) The personnel is sufficient to profitably maintain and support such an exchange.

Post exchanges are Government instrumentalities. *See Ops. J. A. G., September 25, 1923; Ops. J. A. G., December 2, 1619; Dugan* v. *United States, 34 Ct. Cls. 458, 468.*

b. Branch exchanges.

(1) *General.*—At large posts, camps, or stations, where more than one exchange store is needed or desirable, the commanding officer may establish and maintain branch exchanges or subexchanges, which will be under the supervision and control of and form a

---

* This pamphlet supersedes AR 210-65, June 20, 1928 (including Changes No. 2, May 7, 1928), which has been changed as follows:
Paragraphs 2, 5, 8, 17, 27, 32½, 34, 39, 41, 49, 54, and 59½ changed.
Paragraphs 34 and 66 added.
Paragraphs 33 to 76 renumbered.

53767°—29——1

part of the post exchange. The commanding officer upon the recommendation of the post exchange council will determine the number and location of the branch or subexchanges.

(2) *Normal number.*—At a post, camp, or station where branch exchanges are established and maintained there will be normally one completely stocked branch exchange to each regimental area or the approximate equivalent thereof. In case it is desirable to combine several regimental groups of participants into one branch exchange on account of particular location or other local considerations, the commanding officer may vary the general basis of apportionment of one branch exchange per regiment.

(3) *Subexchanges.*—A subexchange implies a smaller store not completely stocked, of a more or less temporary character, and is usually established for the convenience of the men at street-car terminals, theaters, clubs, or other educational and recreational centers, temporary camp sites, etc., where men congregate and exchange business is justified.

c. In the field.—During active operations the commanding officer of troops in the field may authorize exchanges when conditions make it desirable and practicable to do so.

d. In time of war.—In time of war, exchanges may be established and maintained, and will continue to function, where practicable, as prescribed in these regulations.

e. On Army transports.—The establishment of organization exchanges by troops traveling on Army transports is not authorized.

2. General authority and responsibility of commanding officer.—Subject to the general supervision of superior authority, the commanding officer has complete jurisdiction over the conduct of all exchanges within or pertaining to his command. He will be held strictly responsible for their efficient operation and for the enforcement of exchange regulations. After he has approved an appropriation of the post exchange council he will be held responsible for all expenditures pertaining thereto not made in accordance with regulations.

3. Designation; name in which business transacted.—*a. Designation.*—The exchange will be designated as the post, camp, company, or detachment exchange accordingly as it pertains to a post, camp, company, or detachment, and will consist of the necessary personnel, offices, warehouses, fixtures, and other property, merchandise stock, a central exchange store (if established—or not as circumstances warrant), and such branch exchanges and subexchanges as may be authorized by the commanding officer.

b. Name in which business transacted.—All the business of an exchange will be transacted in the name of the exchange and not in the name of the exchange officer, exchange steward, or other person. All correspondence, orders for merchandise, and other papers will, therefore, be as follows:

THE POST EXCHANGE,
FORT SNELLING, MINN.

[Date] _____

* * * * * * *

[Signed] THE POST EXCHANGE,
[Typed] By JOHN DOE,
JOHN DOE,
1st Lt. 28th Inf.,
Exchange Officer.

Signature will be made with pen or, when necessary, with indelible pencil, but never by facsimile.

4. Primary purposes, selling prices.—*a. General.*—The primary purposes of an exchange are—

(1) To supply troops, at the lowest possible prices, with articles of ordinary use, wear, and consumption not supplied by the Government.

(2) To afford to troops means of rational recreation and amusement.

(3) Through exchange profits to provide, when necessary, the means for improving the company messes.

b. Equality of purposes.—The affording of means of rational recreation and amusement will be regarded as of equal importance with the supplying of merchandise to troops at lowest possible prices, and with supplementing organization messes.

c. Interpretation of term "lowest possible prices."—The term "lowest possible prices," as used in *a* (1), is interpreted to mean that to the net invoice price of an article, less discounts, plus transportation and overhead charges, a percentage will be added sufficient to cover the cost of handling, breakage, or deterioration, and to make a small net profit. In this connection post exchanges should be conducted in such a manner as to be of real assistance and convenience to the enlisted men rather than as large profit-making institutions.

5. Activities included.—*a. General.*—An exchange (including each branch exchange) may include, when desirable, the following activities:

(1) A well-stocked general store, including, when deemed desirable by the council and approved by the commanding officer, a meat market, a vegetable market, and a gasoline filling station. Sales to civilians at a filling station will be limited to civilian employees of the post, camp, or station.

(2) *A well-kept restaurant.*—In the restaurant or lunch room prices will be made as low as the cost of the articles, increased by expenses of preparation, pay of the assistants, and normal waste, will permit. Other than this the tariff of prices will be regulated by the circumstances surrounding each exchange.

(3) A barber shop, laundry, tailor shop, and shoe-repair shop.

(4) A gymnasium, possessing also the requisite paraphernalia for outdoor athletics, such as baseball, football, tennis, polo, golf, etc.

(5) Recreation rooms equipped with billiard and pool tables, bowling alleys, and facilities for other proper indoor games.

(6) A library supplied with books and periodicals.

(7) A theater in which moving-picture service, amateur dramatics, and other entertainments may be conducted.

b. Restrictions.

(1) Activities other than those enumerated above will not be added to the business of an exchange without the authority of the War Department; nor will licenses or concessions be granted to private individuals, firms, or corporations to operate any of the exchange activities without such authority. See also paragraph 516.

(2) The use of any device which savors of gambling, such as punch boards, slot machines, etc., is prohibited.

c. Price lists will be posted conspicuously in the various activities of the exchange, or the articles kept for sale will be conspicuously priced so that patrons will not need to inquire as to the price of any article.

6. Allied recreational activities.—*a.* In addition to supervising the conduct of the post exchange, the commanding officer is charged with the maintenance of recreational athletics, entertainments, service clubs, libraries, and community cooperation. These activities will be centered, ordinarily, about the post exchange, which may, with the approval of the exchange council and the commanding officer, provide the financial support necessary for their maintenance within the limits prescribed in AR 210-50.

b. Should there be any charge for admission to entertainments run by the post exchange, such charges will be prescribed by the exchange council, subject to the approval of the commanding officer.

7. Effect of change in membership and management.—*a.* When all organizations composing the membership of the post exchange are ordered to change station, the business of the post exchange will be settled in full previous to their departure. Should incoming organizations desire to purchase the stock or temporary buildings of outgoing organizations, representatives of the outgoing and incoming organizations will be directed by the commanding officers concerned to equitably decide the amount to be paid for the merchandise in the exchange. Should incoming organizations not desire to purchase merchandise remaining in the exchange the outgoing organizations will make such disposition as directed by the exchange council approved by the commanding officer.

b. Responsibilities for agreements by former management.—All agreements between the post exchange and others will be terminated when the entire membership of the exchange is changed, unless incoming organizations state in writing their acceptance of the agreements, and such agreements are satisfactory to all concerned.

c. All agreements made by post exchanges will contain a statement to the effect that the agreement will be terminated by an entire change in the membership of the exchange.

SECTION II

MEMBERSHIP

	Paragraph
General	8
Application for membership	9
Admission to new exchange	10
Admission to an established exchange	11
Admission on credit	12
Temporary privileges in exchange	13
Withdrawal from exchange	14
In case of complete transfer of an exchange	15

8. General.—*a. Who may be members.*—The members or stockholders of an exchange, including branch exchanges and subexchanges, will be such companies, troops, batteries, aero squadrons, or other similarly organized units and detachments as have purchased stock in the exchange. The word "detachment" as here used will be understood to mean a number of enlisted men permanently stationed at the post, but who do not belong to any company or similar unit stationed thereat. No detachment of less than three men associated in a mess will be a member, but men of different arms or services who are permanently stationed at the post may be grouped to form a detachment for separate membership as such; or if quartered and messed with an organization stationed at the post such men may be, upon authority of the corps area

commander, attached to the said organization for the purpose of post exchange membership, and the number of shares of post exchange stock purchased by the said organization may be increased accordingly.

b. Extent of membership.—When there is a post exchange with branch or subexchanges, an organization or detachment participating is a member of the main exchange, and will participate in all dividends declared by the post exchange.

c. Membership not obligatory.—Membership in a post exchange is not obligatory. See paragraph 816.

d. Distribution of profits.—When, at the end of each quarter, or oftener if deemed advisable by the council and commanding officer, an exchange is absolutely free from debt a sum sufficient to pay all outstanding bills at any and all times will be taken from the cash on hand and set aside as a reserve fund, and the remainder of the net profits of the exchange for the period specified will be disposed of in the following manner:

(1) Five per cent will be set aside as a fund which will be divided among the members of the exchange proportionately to the authorized enlisted strength for the post, camp or station of the member organizations or detachments. It will be distributed as follows:

(*a*) Where the members belong to regiments the share of such members will be paid into their regimental funds wherever the headquarters of the regiment may be stationed.

(*b*) Where the members belong to independent separate battalions, or similar organizations of whatever arm of service, such portion of their share as is deemed equitable by the council and the commanding officer will be paid to the band or bands serving at the post, and the remainder into the separate battalion, or similar organization, headquarters fund.

(*c*) Where the members belong to organizations having no regimental or independent separate battalion headquarters, their share will be paid to the band or bands serving at the post, if there be any; otherwise to such members.

(*d*) When organizations holding membership in the exchange are temporarily absent the 5 per cent, or the amount set aside, as gained during their absence will be divided among the remaining members of the exchange proportionately to their dividends and distributed as provided for above.

(2) Such sum as the council shall recommend and the commanding officer shall approve will be set aside as a portion of the recreation fund to be disbursed by the recreation officer as prescribed in paragraph 4*f*, AR 210–50. Property purchased with funds so derived will be accounted for as prescribed in paragraph 18*a* (1), AR 210–50.

(3) Such sum as the council, with the approval of the commanding officer, may determine may be appropriated for the benefit of the entire garrison to all or any of the following purposes:

(*a*) Laying out, preparing, and cultivating gardens, and supplying therefor the necessary seeds, roots, or plants.

(*b*) The purchase of books, newspapers, periodicals, stationery, etc., for the exchange or post library.

(*c*) The purchase of gymnastic appliances when there is no gymnasium connected with the exchange.

(*d*) Prizes for athletic sports.

The expenditure of profits for purposes other than these requires the approval of the corps area commander.

(4) The commanding officer is authorized to approve such appropriations to the chaplain's fund from post exchange profits as the exchange council shall from time to time recommend.

(5) The remaining money will be divided among the organizations or detachments contributing to the exchange on such equitable basis as shall be determined by the council with the approval of the commanding officer. Normally the distribution should be made to organizations according to the number of rations drawn by them for the period covered by the distribution. Where differences in this respect arise between the council and commanding officer the decision of the corps area commander will be final. The money thus distributed will be paid into the company or detachment funds. In addition to the dividends for the hospital detachment, the exchange council, with the approval of the commanding officer, shall determine the amount, if any, to be turned over to the surgeon for the sick in the hospital. Donations to a division or brigade headquarters fund, as distinguished from the funds of the headquarters and military police company of the division or of the headquarters and headquarters company of the brigade, are not authorized.

Any variation from these rules requires the sanction of the Secretary of War.

e. Liquidation of shares.

(1) A division of the cash resources after all debts have been paid will also be made whenever the troops, or any part of them, being members of the exchange, change station; in this event no deduction on account of the reserve fund will be made from the share of the withdrawing troops.

(2) The amount of any loss that an exchange may sustain in consequence of the failure of a soldier to pay for articles properly bought on credit, whether by his discharge without sufficient money due on his final statement to pay the debt or by his desertion, will be deducted from the share of the profits of the company or organization to which the defaulter belonged. Losses by fire or other casualty, death of the debtor, depreciation of value of the fixtures, and deterioration of articles kept for sale, and the accidental breakage of fixtures or other property will be borne by all the participating organizations in common, and will be deducted from the gross receipts before dividing the profits. Credit accounts should be treated as bills receivable until they are settled or found to be a loss, but bills receivable should not be included in the gross amount from which profits are resolved. The amount of cash on hand on the dates specified, after setting aside a sum sufficient to pay all debts, constitutes the sum subject to distribution.

9. Application for membership.—The commanding officer of a company or similar unit or detachment desiring membership in a post exchange will make application therefor in writing to the commanding officer. This written application will be forwarded and filed with the exchange records.

10. Admission to new exchange.—*a. Number of shares.*—The total number of shares in an exchange will be the same as the total authorized strength for the post, camp, or station in enlisted men of all organizations participating in the exchange.

b. Amount to be paid.—When an exchange is first established, the exchange council will fix the amount necessary for its establishment. When this amount has been determined, it will be divided by a number equal to the number of shares, the result being the value of one share. The amount to be paid by or to be charged to any company or detachment for its entrance fee or capital stock will be determined by multiplying the value of one share by a number equal to the authorized enlisted strength for the post, camp, or station of the company or detachment seeking admission.

11. Admission to an established exchange.—*a. Appraisal of value of exchange.*—Whenever a company or detachment applies for membership in an exchange already organized, a careful appraisal of the net worth of the exchange will be made by a disinterested officer—preferably a field officer—to be appointed by the commanding officer, who, whenever practicable, will be assisted in the performance of the duty by two officers, one representing the stockholders and one representing the incoming organization. These assistants will be designated by the commanding officers of the organizations concerned. The report of the appraiser will be accompanied by itemized lists of property and merchandise as certified by the exchange officer.

b. Amount to be paid.—The amount to be paid by an incoming organization will be determined by dividing the net worth of the exchange, as determined by the appraisal, by a number equal to the number of shares already owned in the exchange, and multiplying the quotient by the authorized enlisted strength.

c. Increase in number of shares; disposition of amount received.—The number of shares in the exchange will be increased by a number equal to the authorized enlisted strength for the post, camp, or station of the incoming organization. The sum paid into the funds of the exchange, as provided in *b* above, will be regarded the same as funds originally invested and be properly entered on the books of the exchange.

12. Admission on credit.—*a.* A company or detachment joining an exchange when unable to pay in cash may, upon the recommendation of the exchange council approved by the commanding officer, be charged with its entrance assessment, and such charges may be liquidated from the company's or detachment's share of the profits of the exchange when dividends are declared, or upon closing out of the exchange. An organization joining on credit will submit to the exchange council some written evidence of its debt and obligation to pay the amount assessed, and such paper should be carried on the books of the exchange as an "account receivable." It is an asset and should be reduced in value from time to time as the profits are divided.

b. When an organization is admitted on credit, the number of shares will be increased as in paragraph 11*c*.

13. **Temporary privileges in exchange.**—When an organization is to be only temporarily stationed at the post, camp, or station, membership in the exchange may, upon recommendation of the exchange council, approved by the commanding officer, be denied, and in such case the organization in question may be allowed the privileges of the exchange and then shall be paid not to exceed 10 per cent of the amount spent in the exchange by the members of the organization in lieu of its share of net profits. The exact percentage to be paid will be fixed by the exchange council, subject to the approval of the commanding officer.

14. **Withdrawal from exchange.**—*a. Upon change of station.*—When organizations are ordered away from a post, camp, or station, and they have an interest in the exchange, their interest therein will be liquidated.

b. General procedure, withdrawal.—When an organization desires to withdraw from an exchange, the procedure will be similar to that for admission to membership prescribed in paragraph 10. The value of its share of the net worth being determined, that sum will be withdrawn from the gross funds of the exchange and paid over to the withdrawing organization. The exchange will turn over to the withdrawing organization any of its enlisted men's notes, and the amount thereof will count as cash payment to the organization. Any amount due but, for lack of available funds, not paid to an organization when retiring from an exchange will be evidenced by a note for the amount, with legal interest, and will be liquidated as other bills, payable out of the first profits accruing to the exchange. The amount so due and unpaid will be carried on the books of the exchange as an "account payable" and be regarded as a liability until paid.

15. **In case of complete transfer of an exchange.**—See paragraph 7.

SECTION III

PERSONNEL.

	Paragraph
General	16
Exchange officer	17
Exchange steward	18
Assistants	19
Employment of bookkeeper	20
Prohibition of perquisites	21
Bonding of exchange officers or assistants	22
Employment of auditing accountant	23
Committees of noncommissioned officers	24

16. **General.**—*a. When there are no branch exchanges.*—Under the commanding officer, and subject to the approved recommendations of the exchange council, the following personnel will conduct the operation of an exchange which has no branches:

(1) An exchange officer.
(2) An exchange steward.
(3) Such other assistants as may be necessary and authorized by the exchange council and commanding officer.

b. When there are branch exchanges.—When there is a branch exchange, or exchanges, the exchange officer provided for in *a*(1) will be known ordinarily as the post exchange officer, and there will be detailed for each branch exchange an officer who will be assistant to the post exchange officer, a branch exchange steward, and such other assistants as may be necessary and authorized. How-

ever, when the garrison consists of a single regiment, or similar command, or when the branch exchanges are small, the assistant exchange officers may be omitted, the duties being performed by the post exchange officer.

a. Post exchange council.

(1) Post exchange councils are assembled to—

(*a*) Audit the exchange funds.

(*b*) Ascertain and examine the sources from which and methods by which they have accrued.

(*c*) Recommend expenditures and appropriations therefrom.

(2) (*a*) Except as prescribed in (*b*) and (*c*) below, the post exchange council will consist of the post exchange officer and the commanding officers of each company, troop, battery, hospital detachment, or similar organization participating in the profits of the post exchange as members thereof.

(*b*) In posts or camps containing tactical divisions or other large bodies of troops, the post exchange council may, when so ordered, consist of the post exchange officer and the commanding officer or a representative selected by him of each regiment or other separate organization having one or more units participating in the exchange.

(*c*) At a general hospital the council will consist of not less than three members, in addition to the exchange officer. Members in excess of those required by (*a*) above will be appointed by the commanding officer.

(3) The post exchange council may delegate to an executive committee of its own members the performance of such portion of the duties prescribed for the council as the council may decide, but the council retains its responsibility.

(4) In meetings of the post exchange council each member will be entitled to vote on all questions the number of votes equal to the number of shares of stock held by the organization of which he is the representative, and a majority of the number of shares of stock voted will decide the question.

(5) The council may be convened at any time at the call of its president or at the request of the exchange officer or one of its members or by direction of the commanding officer and, subject to the approval of the latter, will—

(*a*) Designate the articles to be kept for sale.

(*b*) Fix the prices at which they will be sold.

(*c*) Authorize and supervise all purchases of supplies.

(*d*) Fix the schedule of charges of the barber shop, laundry, restaurant, cobbler, and the prices charged by company tailors and tradesmen for making and repairing uniforms of enlisted men.

(*e*) Not later than the 15th of each month, meet to—

1. Examine the books of the exchange.

2. Inspect the quality and prices of the articles for sale.

3. See that the exchange regulations are complied with.

A record of the attendance by name will be entered in the council book.

(6) Prior to the meeting of the council the commanding officer will designate one member of the council other than the exchange officer to audit the accounts and records of the exchange. The officer so designated will certify in the exchange council book—

(*a*) That he has audited all of the accounts and records of the exchange in detail as required by Section VIII,

(*b*) That the financial condition of the exchange, as shown in the council book is correct,

(*c*) That the accounts and records were found correct except ---------- (here should be listed all irregularities and deficiencies noted during the audit, including accounts found delinquent), and

(*d*) That the following results were obtained from verification, under paragraph 64, of the stock record account:

	Selling price	
Inventory, beginning of month	$--------	
Merchandise purchased during month	--------	
Total accountability		$--------
Receipts from sales during month	--------	
Other credits:		
Merchandise returned	--------	
Merchandise condemned	--------	
Merchandise expended	--------	
----------	--------	
Inventory, end of month	--------	
Total credits and on hand		----------
Difference		----------

(7) At the end of each month and as provided for in paragraph 17 *b* (1) (*d*), a member or members of the council, detailed by the commanding officer, will take a thorough inventory of the stock, cash, and fixtures. The officer or officers so designated will make entry (or will retain one copy of the inventory taken and will check therefrom the posting) in the inventory column of the stock record book of the inventory and the value at both cost and selling prices of each article of stock, together with total values of same at both prices. All inventory data will be carefully guarded by the inventory officer until finally posted and checked by him in permanent form in the inventory column of the stock record book. The inventory officer will certify in the stock record book—

(*a*) That he has accurately inventoried the stock, cash, and fixtures of the post exchange;

(*b*) That the record of inventory of the stock, including both its cost and selling values, and that of the fixtures, including their present values, as entered therein, are correct; and

(*c*) That the actual cash on hand and in bank on ---------- (Date) was $----------

(8) A statement of the result of the monthly investigation and of the accounts of the exchange officer, showing the receipts and expenditures during the month; the assets and liabilities and the value or net worth of the exchange at the end of the month; the increase or decrease in the value of the exchange since last report; the profit or loss in the different departments, etc., constituting this increase or decrease and the percentage of gross profits, all a part of the proceedings, will be entered in the post exchange council book which will be kept at each post and submitted to the commanding officer for his action. Should the post or other commander disapprove the proceedings, and the council, after reconsideration, adhere to its conclusions, a copy of the proceedings will be sent by the commanding officer to the corps area commander, whose decision thereon will be final. The final orders in each case will be entered in the council book. A copy of the statement, with the commanding officer's remarks indorsed thereon, will be exhibited in a conspicuous place in one of the rooms of the exchange during the ensuing month. Any question not involving pecuniary responsibility upon which the exchange council and commanding officer may disagree will be submitted for final decision to the corps area commander.

17. **Exchange officer.**—*a. General.*—The post exchange officer will be carefully selected and will be detailed by the commanding officer. He must be fully in sympathy with the purposes of the exchange and must possess the business qualifications necessary for its success. He will receive no compensation for his services as exchange officer. In large commands he should be a field officer of extended experience.

b. General duties.

(1) *Of exchange officer.*

(*a*) Under the commanding officer, the post exchange officer is in charge of the post exchange and is responsible for its management. He will prescribe and enforce rules of order. He is responsible for the proper performance of the duty of his assistants. He will in person check their accounts frequently, and will each day check up the steward's daily report. He will be the custodian of the exchange funds, and as such he will himself keep the cashbook and make all entries therein. At a convenient time, which meets with the approval of the commanding officer, prior to closing the exchange each day he will, for safe-keeping over night, place and lock in his office safe all cash and checks except such amount in the exchange steward's possession, not to exceed the amount of his bond (par. 22), as the commanding officer on the recommendation of the council may authorize; and will deposit all except a working balance in a bank at the first opportunity.

(*b*) No employee of the post exchange or any of its branches will have access to the cash of the exchange after it has been turned over to the post exchange officer, or, in the case of branch exchanges, to any of his commissioned

assistants. Except for small amounts of cash which may be necessary to be kept in the cash registers during the hours of the current day's business for the purpose of making change, and except for cash necessary to be on hand for making change on pay day, all post exchange funds will be kept on deposit in a reputable national or State bank, or trust company other than a private bank, preferably a United States depository which is a member of the Federal Reserve banking system. In case no national bank is reasonably available, a regularly chartered State bank may be used as a depository for post exchange funds. The post exchange officer is responsible for all loss of post exchange funds, where the loss is due to his fault or neglect. Under no circumstances will post exchange funds be taken away from the post where the organizations to which they pertain are stationed, except as may be necessary to pay indebtedness, or for deposit in a bank.

(*c*) Should the officer who is custodian of the post exchange fund be absent from the post, on leave or otherwise, for a period beyond 3 and less than 10 days, he will leave the funds with the officer acting in his place, taking a memorandum receipt therefor. If an officer is to be absent for more than 10 days, he will regularly transfer to his successor the funds of which he is custodian.

(*d*) When an exchange officer is relieved, an inventory of all stock, fixtures, notes receivable, credit checks, and coupon books on hand, etc., will be taken and the assets so ascertained to be on hand, together with all the funds, will be transferred to his successor, receipts being taken therefor.

(*e*) In transferring funds to a successor the accountable officer will make the following certificate, including list of outstanding debts and obligations, in the fund or council book:

"I certify that, to the best of my knowledge and belief, the following is a complete and accurate statement of all outstanding debts and obligations to date, payable from this fund."

In case there are no outstanding debts or obligations, he will certify accordingly.

(*f*) Post exchange funds deposited in a bank, will be placed under their official designation as, for example, the Post Exchange, Fort Meyer, Va., by—— 1st Lt. 3 Cav. Exchange Officer, and not to the credit of the officer who is custodian.

(2) *In case of large exchanges.*—The post exchange officer will be in charge of all exchanges at the post, camp, or station. Ordinarily he will be in personal charge of the central exchange store, where the office of the post exchange should be located. In general he will—

(*a*) Manage the central exchange store and all branch and sub-exchanges.

(*b*) Cause the books and accounts of all branch and subexchanges to be kept at the central exchange store.

(*c*) Supervise and coordinate the accounting systems of branch and subexchanges in accordance with the accounting system prescribed herein and to insure uniformity.

(*d*) By authority of the post exchange council, approved by the commanding officer, he will make purchases (par. 51) and settlements for the central exchange store, and for all branch and subexchanges to insure lowest costs.

(*e*) Under the approved policy of the post exchange council, regulate selling prices in all exchanges with a view to establishing and maintaining a uniform price for the same article.

(3) *Of assistant exchange officers.*—Under the post exchange officer, the duties of an assistant exchange officer are similar to those of an exchange officer. He will be detailed by the commanding officer and will conduct the affairs of his branch exchange in accordance with instructions from the post exchange officer. Ordinarily there will be detailed one assistant exchange officer for each branch exchange. Subexchanges should be placed under the supervision and management of the nearest branch exchange officer; or they may be managed directly by the post exchange officer. In the temporary absence of the post exchange officer, the senior assistant exchange officer will act as post exchange officer, unless otherwise directed by the commanding officer.

18. **Exchange steward.**—*a. General.*—The exchange officer will be assisted by an exchange steward, generally a noncommissioned officer, but in large exchanges where financial and other considerations fully justify it he may be a civilian. The exchange steward should possess a good knowledge of commercial customs, should be of unquestionable integrity, and of sufficient firmness and strength of character to enforce order and discipline about the premises.

b. General duties.

(1) *General.*—In the temporary absence of the exchange officer the exchange steward will be in immediate control of the exchange and the business thereof when there are no commissioned assistants. Except where a bookkeeper is employed, the steward will keep the records and books of the exchange, under the supervision of the exchange officer. The steward will exercise the necessary supervision over his subordinates, frequently checking their conduct of business. In case the post exchange has branches, there will be a steward for each branch or subexchange. There is no authority for the steward or any other enlisted or civilian subordinate to make purchases for or contract indebtedness against the post exchange. See paragraph 17*b*(2) (*d*).

(2) *Daily report.*—The exchange steward will submit to the exchange officer a daily report covering the day's transactions, known as "Steward's Daily Report," showing the following:

(c) *1.* Cash received from sales.
2. Cash received on account.
3. Cash expended.
4. Cash ahead or short.
5. Cash-register readings.
(*b*) *1.* Credit checks received from sales.
2. Credit checks outstanding.

These reports, exhibiting the exchange officer's approval, will be placed on file in a conspicuous place in one of the exchange rooms.

19. **Assistants.**—The exchange steward and branch or subexchange stewards will be assisted in the conduct of the business by the necessary assistants. These assistants will ordinarily be enlisted men, but in an exchange where financial and other considerations fully justify it they may be civilians, preference being given to retired enlisted men and honorably discharged soldiers. When enlisted men are detailed for duty in an exchange, they will, as far as practicable, be from organizations participating in the exchange.

20. **Employment of bookkeeper.**—A bookkeeper may be employed by an exchange when such employment is evidently desirable and the financial condition of the exchange entirely justifies this expense.

21. **Prohibition of perquisites.**—No exchange officer or assistant of an exchange, either directly or indirectly, shall have any personal interest in purchases, sales, or profits, or any advantage of wastage or perquisites of any kind whatsoever. Exchange officers and employees will not be permitted to receive gifts or presents of any kind from merchants or individuals having business relations with the post exchange. The acceptance of presents by any person connected with a post exchange is considered incompatible with a proper performance of exchange duties.

22. **Bonding of exchange officers or assistants.**—When desirable an exchange council may, with the approval of the commanding officer, require a bond in a reasonable amount from any exchange officer or assistant, to insure the proper handling of the funds and property intrusted to them. The expense of bonding will be borne by the exchange.

23. **Employment of auditing accountant.**—With the approval of the commanding officer, an exchange council may authorize the employment of an expert accountant at stated intervals to audit the books of the exchange, the expense to be borne by the exchange. In such cases the commanding officer and the post exchange council retain their full responsibility.

24. Committees of noncommissioned officers.—*a. Composition.*

(1) *Where there are no branch exchanges.*—For each exchange having no branches, there will be a committee of noncommissioned officers, consisting of one noncommissioned officer from each organization and detachment participating in the exchange, and known as the "Exchange Committee of Noncommissioned Officers."

(2) *When there are branch exchanges.*

(*a*) *For the post exchange.*—For each post exchange with branches there will be a committee of noncommissioned officers consisting of one noncommissioned officer selected by the commanding officer to represent each branch exchange.

(3) *For each branch exchange.*—For each branch exchange there will be a committee of noncommissioned officers consisting of one noncommissioned officer from each company and detachment within the branch exchange area.

b. Meetings; duties.—The exchange committee of noncommissioned officers will be convened by the commanding officer not less than four times a year. The committee will submit to the post exchange council its views, orally or in writing, in respect of the immediate internal operations of the exchange, and it will recommend any changes that may be desired by the enlisted men. Its views and recommendations will be carefully considered by the council, whose action thereon will be reviewed by the commanding officer. Recommendations approved by the commanding officer will be put in effect at once.

SECTION IV

MANAGEMENT

	Paragraph
General	25
Blank forms	26

25. General.—The following suggestions, based upon the systems which have been found most satisfactory by experienced exchange officers, are published for the information of all concerned:

a. Scheme for keeping account of stock.

(1) All stores not in salesroom to be kept in storeroom under lock and key and a competent employee detailed as storekeeper. He should receive all stores of whatever nature coming into the exchange and issue the stores to the several departments on requisitions in writing approved by the exchange officer or the steward. (Form A.)

(2) If stores in one department are needed in another they should be turned in to the storekeeper on approved "Turn in" card (Form B) and issued on approved requisition. Damaged or spoiled stores should be entered on a "Damage Report" (Form C), which, after approval by the exchange officer or steward, should be turned over with the stores to the storekeeper.

(3) The storekeeper should be provided with a stock record book in which to charge the storeroom with the cost of all stores received and credit it with the cost of all stores issued, charging each department with the cost of stores issued thereto, crediting each department with the cost of all articles sold and the cost of all stores turned in on account of damage or otherwise. (Form D.)

(4) The invoices of stores received together with the approved "Turn in" orders will be the vouchers for the debit entries of the storeroom account. The credit entries will be the approved requisitions. Approved receipted requisitions will be the vouchers for the debit entries against each department; and sales (cost value of articles), "Turn in" orders, and damage reports will be the vouchers for the credit entries.

(5) The balance on hand in the storeroom and in each department, as shown by the stock record, should be equal to the total cost of the articles on hand in each as determined by inventory.

(6) This system does not depend on the names of the individual articles, except as to inventory, but deals only with the total cost values, thus eliminating much detail, but at the same time showing whether or not the stock is being properly accounted for.

(7) There are three checks:

(*a*) For all articles reported sold the equivalent in cash, checks, or credit must be turned in by the salesman.

(*b*) Should a salesman report less than he actually sells, he will be short at the end of the month, or at such time as he may be checked up. All shortages will be made good by the salesman.

(*c*) The storeroom and each department may be checked at any time by taking an inventory, determining the total cost of the articles found to be on hand, and comparing the same with the balances shown by the stock record.

(8) The stock record should be ruled so as to show—

(*a*) The total cost of articles on hand in the storeroom at the last inventory.

(*b*) The total cost of articles received into the storeroom since the last inventory, as shown by invoices, transferes from departments, etc.

(*c*) The total cost of articles on hand in each department at the last inventory.

(*d*) The total cost of articles issued to each department on approved requisitions.

(*e*) Cost of articles sold from each department.

(*f*) Cost of articles turned in from each department.

(*g*) Cost of stores condemned.

(9) Another method whereby a verification can be made is to calculate the value at the selling prices of all articles on hand at the beginning of the month in each department and to charge it with the total; then charge each department with the selling price of all goods issued to it during the month; the total of the two is the amount for which the department is accountable. Crediting the department with the amount of sales and with the value of goods turned in, damaged or spoiled, and condemned, at the selling prices, gives the amount accounted for. The difference between the two should be the total value of merchandise on hand at selling prices. The verification by the auditing officer required by paragraph 71 is a check against the exchange officer of all stock for which the latter has assumed accountability. For his own protection, the exchange officer should in turn check against each department in accordance with the provisions of this subparagraph in order definitely to fix the responsibility to him for any shortage that may exist, charging such shortage against the responsible salesman or salesmen, as prescribed in (7) above.

b. Simplifying accounts when exchange is on a cash basis.—Enter each invoice in a purchase record, as shown in Form E. (A unit-ruled blank may be obtained for this purpose, or an ordinary blank may be ruled as indicated.) When the bill is paid, enter the information as shown. This system is suitable

only when the exchange is on a cash basis. It has the advantage of showing all invoices on the same account. If the invoices are numbered serially and bound in serial order at the end of the month, auditing is facilitated. When this system is used the bill register is unnecessary.

c. Simplifying accounts that are practically cash accounts.—As accounts for merchandise purchased by officers and organizations are required to be settled at the end of the month and are practically cash accounts, the following scheme will reduce clerical work and facilitate auditing:

All charge slips are entered as received, under the name of the purchaser, in a duplicating bill file, consisting of a binder containing sheets with the exchange billhead and blank sheets alternately. The name of the purchaser is first written in the billhead and then the charges are entered from the charge slips received from day to day, the whole being duplicated on the blank sheet by carbon process. The duplicate should be retained and the original sent out as a bill.

d. Restaurant account.—A separate account should be opened with the restaurant (or lunch counter), as this is a manufacturing department and requires careful supervision to enable it to yield suitable profits. This account should show the quantity and cost of all articles received for the restaurant, cost of labor, and the quantity and total cost of all articles as made up for sale.

e. Account of sales.

(1) Each salesman should be required to keep a record of each sale made by him. This may be kept conveniently on a duplicate sales pad. If the system of keeping account of the stock described herein should be adopted, the salesman should note on the retained slip the cost of each article sold and should enter the total cost of the sale shown by each slip on a tally card in the back of the sales pad. Credit sales must be shown by writing the name of the purchaser at the top of the slip. Cash and check sales will be shown by the absence of the name of the purchaser. Cash slips may be marked + and check slips #, in order to distinguish them. At the close of the day's business the steward should receive from each salesman the tally card showing the total cost of the articles sold, together with the sales slips and a report on a form similar to the following:

Sales Report

Fort _____,

_____, 192

Cash _____

Checks _____

Credit _____

Total _____ _____

_____

In charge.

(This will accompany the steward's report)

AR 210-65

(2) The steward should total the slips under each head, compare them with the report, and check the total of all sales as shown. He should also total the cost prices of the articles sold by each salesman as shown by the tally card, and should see that the storekeeper enters the same in the stock record to the credit of the proper department. The steward should also see that the charge slips are entered on the proper accounts of the duplicate bill file, and should then make out his daily report to the exchange officer on a form similar to the following:

STEWARD'S DAILY REPORT

Post Exchange,

Fort.....

RECEIPTS

	Credit	Checks	Cash	Total
Restaurant.....				
Store.....				
Recreation rooms.....				
....., etc.....				
.....				
Total.....				

Checks issued, $.....

....., *Steward.*

Received, $.....

[Signed] .....

[Typed] *1st Lt.* ——— ———,

Exchange Officer.

....., 192 .

(3) *Cash register.*—When practicable, one or more cash registers, purchased from exchange funds, should be used in the exchange. The turn-back keys of cash registers should be in the hands of the exchange officer or assistant exchange officer to enable him to make verification of reports made from the registers.

26. Blank forms.

FORMS

Form A

Requisition

Dep't..... Date.....

Clerk..... O. K.....

Amt.	Article	Cost	Total
	Total....		

Received the above articles.

.....

Check carefully, as you are responsible for this property.

Form B

Turn In

Dep't..... Date.....

Clerk..... O. K.....

Amt.	Article	Cost	Total
	Total....		

.....

Storekeeper.

Make in duplicate and keep one.

NOTE.—This form should be printed in red ink.

Form C

Damage Report

Dep't..... Date.....

Clerk..... O. K.....

Amt.	Asticle	Cost	Total
	Total....		

.....

Storekeeper.

Make in duplicate and keep one.

NOTE.—This form should be printed in red ink.

Form D

Storekeeper's Stock Record (Par. 25 a (3))

191			Storeroom										Grocery										Notions										Etc.
			Dr.					Cr.					Dr.					Cr.					Dr.					Cr.						
Jan.	1	*Inventories*	£	5	0	0	00							6	5	0	00							5	0	0	00							
	1	*Requisition*								6	0	00			6	0	00																	
	1	*Sales*																		4	0	00								2	5	00		
	2	*A. B. & Co. (1)*		1	0	0	00																											
	2	*Damage*																																
	2	*Turn in*				5	00																									1	00	
	2	*C. D. & Co. (1)*			5	0	00													5	00												
		Etc.																																
		Totals	£	6	5	5	00			6	0	00		7	1	0	00			4	5	00		5	0	0	00			2	6	00		
		Balances						£	5	9	5	00							6	6	5	00						4	7	4	00		
								£	6	5	5	00							7	1	0	00						5	0	0	00		

Form E

Purchase Record, Month of January, 192

191			1 Total				2 Merchandise				3 Expense				4 Fixtures				5 Errors				Discount 10	30	60	Date paid		Amount paid				Discount			Remarks
Jan.	2	A. B. & Co.	1	6	0	00	1	0	0	00					6	0	00						2			Jan.	10	1	4	7	00			3	00	
	2	C. D. & Co.		7	5	00		5	0	00			5	00	2	0	00			1	25		6			Jan.	12			6	9	25			4	50	

SECTION V

RECORDS

	Paragraph
General	27
Cashbook	28
Journal	29
Ledger	30
Stock record book	31
Bill register	32
Invoice file	33
Incoming mail	34
Other books and records	35

27. General.—*a.* Except as otherwise authorized in paragraph 35, the books named in this section will be kept in each post exchange, in the manner described hereinafter.

b. How accounts kept.

(1) *General.*—The post exchange officer will cause all the accounts of the exchange, including those of branch or subexchanges to be so kept that the status of the exchange or any of its branches can be readily understood at any time and that the information necessary to render the prescribed reports will be readily available.

(2) *Double entry system.*—A double entry system of bookkeeping will be used.

c. Destruction of old records.—All invoices, receipted bills and other books and papers relating to the business of an exchange, except the exchange council book, and pertaining to accounts that have been closed more than six years, may be salvaged as no longer required for the protection of the exchange, except in the case of an exchange where the statute of limitations prescribes a longer period on such accounts, in which case the papers will be kept for such longer period, unless with respect to an entry or omission of an entry therein a civil claim or criminal action shall have been presented or initiated, under which circumstances the destruction of the records concerned will be postponed until after disposition of the claim or criminal action. Under the direction of the commanding officer, the papers specified will be salvaged by the exchange officer who will record the action in the exchange council book.

d. When exchange abandoned.—In the event of the abandonment of a post, the post exchange council book, together with all records not salvaged as above provided, will be forwarded to The Adjutant General.

28. Cashbook.—*a.* In the cashbook will be entered each day's transactions, cash received being entered on the left hand, or debit side, and cash paid out on the right hand, or credit side. The date, explanation of the entry, and the amount of the transaction will be entered on a separate line for each transaction. In large post exchanges, where it is necessary to keep a record of receipts and expenditures by departments, such as store, lunch room, meat market, etc., separate columns will be provided for debit and credit entries under each such department.

b. Vouchers.—Each disbursement entry in the cashbook will be supported by an itemized voucher properly receipted by or for the party with whom the transaction was effected. Similarly each entry therein showing a cash receipt, other than one required by paragraph 18 *b* (2) to be shown on the "Steward's Daily Report," will be supported by an itemized voucher (invoice

of funds) properly signed by or for the party with whom the transaction was effected. All other entries showing cash receipts will be supported by the exchange steward's daily reports, which will constitute the remaining debit vouchers. Each set of vouchers (receipts and disbursements) will be serially numbered beginning with No. 1 for the first entry of each month. Each voucher to which an invoice pertains will, in addition to the notations required by paragraphs 32 and 33 to be placed on such invoices, bear the statement that the voucher is correct and just. (See par. 68 d.)

A paid check bearing across the extreme left end of the reverse side thereof, and immediately above where the first indorsement thereon will appear, the notation, "Payment acknowledged on our invoice No. _____, dated _____ (blank spaces to be filled in), together with the invoice or invoices pertaining thereto, may be used as a voucher. A paid check without such notation will not be used as a voucher unless accompanied by a certificate of the exchange officer showing definitely the reason why a properly signed and itemized voucher could not be obtained and also showing by items the exact articles purchased and the cost of each. When it is not practicable to obtain a receipted or signed voucher, the sufficiency of the voucher as certified will be determined and indorsed thereon by the exchange council.

29. Journal.—The journal will be used to prepare transactions for posting to the ledger. It will show by debit and credit items such original entries affecting the business of the exchange as are not posted from the cashbook or other books of original entry.

30. Ledger.—*a. General.*—In the ledger will be entered under separate accounts all debit and credit transactions affecting the business of the exchange, so as to show the amounts due to or from the exchange on each account. The entries under each account will be made from the totals shown in the columns in the cashbook provided therefor, as stated in instructions with reference to the cashbook, or from the journal, if such columns are not provided.

b. Heads under which accounts kept.—In the ledger, accounts will be kept under the following heads:

(1) *Post exchange.*—To show the value of the exchange. This account will be debited with any increase and credited with any decrease in the worth of the exchange.

(2) *Merchandise.*—To show on the debit side the cost of merchandise purchased and on the credit side the amount received for merchandise sold. This account will, at the beginning of each month, be debited with the value at cost price of the merchandise then on hand as per inventory, and will during the month be debited with the cost of all merchandise purchased during that month. It will be credited during the month with all sales of merchandise, and at the end of the month with the value at cost price of all merchandise then on hand as per inventory. The difference between the amounts shown in the debit and credit columns will be the profit or loss for the month. In large exchanges, when it is desired to keep a record of profit and loss by departments, the merchandise account may be kept by departments.

(3) *Bills receivable (enlisted men).*—To show the value of checks or coupons issued to enlisted men, and the amount of cash received

from them in payment of their bills. This account will be debited with all notes given by enlisted men for checks or coupons and credited with all amounts received in payment thereof. The difference will be the amount of notes unpaid.

(4) *Bills receivable (notes).*—To show the amount of notes given by organizations in part payment of purchase money or for other purposes, also the amount of payments thereon and credits from dividends. This account should be debited with all notes received and credited with payments thereof and dividend credits if payments have not been made.

(5) *Bills receivable (credit sales.)*—An account with each person, firm, or organization having any credit transactions with the exchange. This account will be debited with all credit sales and credited with all amounts received in payment therefor. In large exchanges, instead of keeping the accounts individually in the ledger, such accounts may be kept individually in the credit sales book, and at the end of the month or period the total debit and credit entries posted in the ledger. In individual credit accounts of this kind many up-to-date business houses, practically all banks, and some post exchanges have installed automatic bookkeeping machines wherein a loose-leaf ledger and statement system is used. This does away with journal entries and greatly simplifies accounting. Loose leaf statements are printed off directly from the daily credit slips and the account is always balanced to date. At the end of the month it is necessary only to withdraw the original statement which serves as the monthly bill to the customer. The carbon copy is retained and appropriate entry made thereon when the account is paid. In posting ledgers from the statements the automatic machine selects the proper columns for entries, automatically prints dates, adds debits, subtracts credits, and extends and proves a balance with each posting.

(6) *Credit check account.*—To show the amount of coupons issued, coupon sales, and coupons outstanding. This account will be debited with coupon sales and credited with coupons issued. The difference between the debit and credit entries will be the amount of coupons outstanding. If columns are provided therefor in the cashbook, total debit and credit entries at the end of the month or period may be made.

(7) *Bills payable.*—An account will be kept with each person or firm from whom merchandise is bought. Credit the account with all purchases made and debit the account with all payments made on account thereof. As stated above, in large exchanges, instead of keeping the accounts individually in the ledger, such accounts may be kept individually in the purchase-account book and, at the end of the month or period, the total debit and credit entries posted in the ledger.

(8) *Expense account.*—To show the cost of all expenses, such as wages, freight and express, fuel and lights, printing and stationery, telegraph and telephone, insurance, expendable supplies,

or any other expense attendant upon the business of the exchange. This account will be debited with all payments made on account of expenses as shown on the cashbook. Payments of expense may be subdivided, not only in this account but also in the ledger. Transportation should not be charged to operating expenses, but should be added to the cost of the merchandise or fixtures to which it pertains.

(9) *Dividend account.*—To show amount of dividends declared by the exchange council. When a dividend is declared the post exchange account is debited with the amount of the dividend declared and the dividend account credited. When the dividend is paid the dividend account is debited and the cash credited.

(10) *Buildings and fixtures account.*—To show all amounts expended for the betterment of the exchange property and depreciation of value of fixtures. This account will be debited with all expenditures for betterment, repairs, etc., and credited with all depreciation and all receipts obtained from sale of any articles pertaining thereto. Supporting this account is the list of exchange property available as an asset, kept in the stock record book (par. 31).

(11) *Profit and loss account.*—Into the profit and loss account are closed all accounts showing a profit or loss. It is debited for losses and credited for profits or gains. The difference between the two sides will show the net profit or loss and will be transferred to the post exchange account.

31. Stock record book.—*a.* The stock record book will be suitably ruled for and will show under their proper nomenclature all articles of merchandise on hand at the beginning of each month as shown by inventory, and all articles of merchandise received, sold, returned, condemned, and expended during the month. This book will also be suitably ruled for and will show the values at cost prices of all articles of merchandise on hand at beginning of month, for use in the "Merchandise account" (par. 30 *b* (2)), and, in separate columns, the values at selling prices of same and of all articles received, sold, returned, condemned, and expended during the month, for use in the audit (par. 70). If, in the opinion of the council, it is desirable that certain articles be sold in quantities at reduced prices, the stock record account will, in order to enable a proper audit to be made under paragraph 70, show the quantities to be sold at such prices as though they were different brands. For example, if it is desired to sell a certain brand of cigars at 10 cents each, two for 15 cents, or a box for $3, the stock record account will show so many "cigars (brand), singles," at 10 cents, so many "cigars (brand), twos" (or pairs), at 15 cents, and so many "cigars (brand), boxes," at $3. In order to prevent an unnecessary accumulation of stock, such quantities may be transferred from one such group to another by making proper adjustments.

b. In a suitable place in the stock record book there will also be entered a list of all exchange property available as an asset, such as buildings and fixtures, showing date of construction or purchase, quantity, original cost, and depreciation from time to time. The total money value of such property as shown in this list must always agree with the value of same as shown by the "building and fixtures account" in the ledger.

c. There will also be entered in a suitable place in the stock record book a record of the coupons received and issued by the post-exchange officer, as

required by paragraph 44. This record will show in one column all the coupons received, whether authenticated or not, and in another column all those issued by him, so that at any time it can be determined how many coupons should be in the possession of the post exchange officer.

32. **Bill register.**—The exchange officer will personally enter in a blank book, suitably ruled and labeled "Bill Register," a memorandum of every invoice, including the name of the firm from whom received, immediately upon receipt of the same, noting on the invoice "B. R. _____," to show page of entry. Date of receipt of the corresponding merchandise will be noted both on the invoice and opposite the proper entry in the bill register, and when the bill has been paid notation to that effect will be made both on the invoice and opposite the proper entry in the bill register. The outstanding liabilities on account of merchandise purchased, as contained in the financial statement of the exchange recorded in the council book, should agree with the total of all bills not marked "Paid" in the bill register.

33. **Invoice file.**—An invoice file book or file case will be kept. After entry in the bill register, an invoice will be placed in a temporary file labeled "Invoice File, Mdse. NOT Received," and will be kept therein until the corresponding merchandise shall have been received. Upon receipt of the merchandise it will be checked as to quantity, quality, and prices, against the invoice, which will then be placed in another temporary file labeled "Invoice File, Mdse. Received." From time to time the invoices in the latter file will be entered in the proper books and the place of entry noted on each invoice, after which they will be placed in the permanent file, properly labeled. When the bills are paid, the serial numbers of the checks used in payment thereof will be noted on the corresponding invoices, which, if used as vouchers to the cash book, will then be placed in the voucher file. If not so used, they will then remain in the permanent invoice file as supporting papers to the vouchers and will be so arranged that they may be readily located for use in connection with such vouchers during audits and inspections of the cash book.

34. Incoming mail.—*a.* The exchange officer will make effective arrangements to insure the receipt by him in person of all incoming mail for the exchange. Local conditions vary so greatly that the method adopted must be determined locally, but the exchange officer will be held personally responsible for the effectiveness thereof. Suggested methods are a post-office lock box or a locked mail pouch.

b. The exchange officer will either personally open all incoming mail or require it to be opened in his presence.

35. Other books and records.—Such other books and records as are deemed necessary to show stock on hand and value of exchange will be kept in the post exchange by the exchange officer or under his personal supervision.

SECTION VI

CREDIT

	Paragraph
Granting of credit to enlisted men, general	36
Use of credit checks, general; restrictions	37
Use of metal credit checks not favored	38
Use of coupon books	39
Requests for credit and action thereon	40
Payment of notes due	41
Stoppages against enlisted men	42
Distribution of losses	43
Responsibility for credit checks	44
Credit accounts	45

36. **Granting of credit to enlisted men, general.**—*a.* Upon the recommendation of the council, approved by the commanding officer, credit may be given at an exchange to any soldier upon the recommendation of the company or detachment commander, to an amount not exceeding in any one month one-third of his month's pay, except that a noncommissioned officer of the first, second, or third grade may be allowed a credit account in an amount not exceeding in any one month the amount of his unencumbered pay for that month. Credit will not ordinarily be extended to a soldier between the date of last payment on rolls before discharge and the date of discharge. It will be given upon the request of the soldier, in writing. Soldiers granted credit will be distinctly informed that it is their duty to make prompt and unsolicited payment to the exchange officer on the next pay day. Defaulters will be debarred the privileges of the exchange.

b. No credit will be extended to enlisted men between the date of last payment, either full or partial, and the date of departure from the corps area when such credit would necessitate the entering of a charge on W. D., A. G. O. Form No. 24 (Service Record), for collection upon reaching the foreign service station, or the station in the United States, as the case may be.

c. Credit will not be extended to an enlisted man at a discharge and replacement depot or at a place of concentration until receipt of his service record thereat.

37. **Use of credit checks, general; restrictions.**—*a. Authority, how designated.*—The use of checks or coupons representing values and exchangeable for merchandise or other charges at an exchange is authorized. Such checks or coupons will be designated as "credit checks" or "credit coupons."

b. Restrictions.—Care will be taken that credit checks and coupons are not disposed of to unauthorized persons, and to provide against this, they will be redeemed in cash only when received from an activity authorized by the commanding officer to accept credit checks and coupons in lieu of cash.

38. **Use of metal credit checks not favored.**—The use of metal credit checks is undesirable for obvious reasons. The paper coupon-book system is the safest and most generally satisfactory. Although the first cost is greater than in the metal-check or punch-card system, the coupon-book system is usually economical in the end.

39. **Use of coupon books.**—The coupon-book system of extending credit to enlisted men will be used by all exchanges conducted at posts, camps, or stations where more than two organizations are stationed, except at tem-

porary stations and at places where conditions of service have made it impracticable to procure the coupon books. These coupon books will show the organization to which the enlisted man belongs and bear the name of the enlisted man to whom issued, and will be honored at the exchange only when presented by the enlisted man whose name appears on the book, except in the cases of those sick in hospital who are authorized to turn over the necessary credit slips to a chaplain, Red Cross representative or a surgeon to make and deliver purchases for them.

40. Requests for credit and action thereon.—*a.* The following form for requests for credit is convenient:

Company "....," "....." Infantry.

We request credit at the exchange during the month of ....., 192 , to an amount not exceeding that set opposite our respective names.

Fort .....

....., 192....

Names (In the order in which they appear on pay roll)	Credit approved	Credit given	Signature of soldier

Approved: .....

Captain ..... *Infantry*

Commanding Company .....

The foregoing form, duly completed, will be the authority upon which the exchange officer will extend credit. This form will usually be in the hands of the steward, or the assistant charged with issuing credit checks, to whom the men will apply for checks or coupon books. In large garrisons men unknown at the exchange will be identified before checks are issued. Upon applying to the steward or other proper assistant, each man will inform him of the number of checks or value of coupon book desired. This may be for the entire amount of authorized credit or for any less amount. The steward or employee will then make out a note in substantially the following form:

....., 192....	Fort ....., 192....
Name	I, ..., promise to pay to the Post Exchange, Fort ....., after my next payment ..... /100 dollars, for value received.
Grade, etc.	$.....
Amount, $.....	Signature ..... (When checks are issued)
	Grade, etc. .....
	Witness:
	....., *Steward.*

This note will then be signed and witnessed as indicated, after which credit checks equal in value to the amount signed for will be issued, and the amount will be noted opposite the name of the man on the company list. The correctness of the entry will be authenticated by the initials of the person making such entry on the company or detached list. By this means a man may obtain credit for any amount less than that authorized and subsequently may obtain the remainder, or any part of it, in a similar manner. The man's note received in return for credit checks will be the steward's voucher for the issue. A company commander may send such supplementary lists as he may desire, and at any time during the month may request a modification of the lists pertaining to his company. One great advantage of this system is that soldier may get any part of the authorized credit at any time within exchange hours during the month by applying directly to the exchange officer or steward.

b. An alternative method of regulation credit sales is as follows (notes of the following form are kept on hand by the organization commander):

....., 192....	Fort ....., 192....
Name	I, ..., promise to pay to the
Grade, etc.	Post Exchange, Fort ....., after my next payment
Amount $.....	..... /100 dollars, for
	value received.
	$.....
	Signature ..... (When checks are issued)
	Grade, etc. .....
	Witnesses:
	..... First sergeant company
	.....
	..... Commanding company
	.....

Upon the presentation of such a note at the exchange, credit checks for an equal amount will be issued to the soldier who will receipt therefor. Stubs will remain in possession of the organization commander, who thus knows the state of the man's credit at all times without reference of the matter to the exchange.

41. Payment of notes due.—*a. At pay table.*—Before payment of the command the notes of each organization will be arranged in the order in which names appear on the pay roll. When more than one note has been given by the same soldier they will be pinned together and the total marked with colored pencil on the top note. These notes, in connection with the list or lists showing the credit given to the men of each organization, give all information needed for the collection. The exchange officer will be present at the place of payment to receive the men's payments on their notes or, in case of large commands, he may make, with the approval of the commanding officer, such other arrange-

ments as will facilitate the payment. A noncommissioned officer of each organization will be detailed to report to the exchange officer at the pay table to identify the men. See also paragraph 1c, AR 35-2320.

b. When overdue, or due from soldier about to be discharged.—When the debt has remained unpaid for one pay day on which the soldier was paid a balance sufficient to discharge such debt, the note covering same will be turned over to the soldier's organization or detachment commander, and the amount of the note debited against the account of the organization for collection from the first dividends due that organization. The soldier's note then becomes a debit due the company fund and will be entered on the next pay roll of the organization as "Due Company Fund." In case of discharge of a soldier the amount of any such indebtedness will be noted on the final statement as due the post exchange or company fund and will be deducted from payment made thereon. On making such a deduction the paying officer will turn over the amount collected to the post exchange officer, or the organization commander, who will receipt to the paying officer and the soldier for the amount so received.

c. When due from deceased soldier.—The amount due an exchange by a deceased soldier is a debt, and constitutes a proper claim against his estate, and may be legally deducted from the pay and allowances due the same. Exchanges having claims against a deceased soldier will file them directly with the General Accounting Office, Military Division, Washington, D. C.

d. Desertion or dishonorable discharge.—Indebtedness of deserters and soldiers sentenced to dishonorable discharge is paid at the time payment is made by disbursing officers, to the extent of credits available therefor, on supplemental pay rolls required by paragraph 5*d* (3), AR 354-155, and claims will not be submitted to the General Accounting Office in such cases.

42. Stoppages against enlisted men.—Debts due an exchange can be collected from any balance due the soldier only after stoppages for debts due the United States have been satisfied. Travel pay due a soldier on disharge can not be stopped to satisfy a debt due an exchange. Where it clearly appears that a soldier is indebted to an exchange, such exchange may be reimbursed the amount of such indebtedness from the amount of pay and allowances reserved by section 4818, Revised Statutes, from stoppages and fines adjudicated by sentence of courts-martial for the reimbursement of the Government and of individuals. In case of a deserter (as well as in case of a discharged or deceased soldier) who is known to be justly indebted to an exchange, a stoppage not exceeding the amount of credit authorized in the regulations may be lawfully made in favor of the exchange.

43. Distribution of losses.—*a. In case of failure of soldier to pay obligation.*—The amount of any loss that an exchange may sustain in consequence of the failure of a soldier to pay for anything bought on authorized credit, whether by his discharge without sufficient money due on his final statements or by his desertion, or otherwise, will be charged against the membership account of the company or detachment to which the man belongs. On the next distribution of profits, the man's notes will be turned over to the company or detachment commander as part payment on the company's or detachment's share of the dividend.

b. In case of fire, etc.—Losses by fire or other casualty, worthless accounts, except those of soldiers referred to in *a* above and in paragraph 8*e*, depreciation of value of fixtures, deterioration of articles kept for sale, and the accidental

breakage of fixtures or other property will be borne in common by all the participating organizations.

44. **Responsibility for credit checks.**—Credit checks or coupons are, when properly authenticated, as valuable as cash. The exchange officer, on taking charge of an exchange, will verify the amount of credit checks or coupons turned over to him, and thereafter will carefully keep an account of receipts and issues. When metal credit checks or paper coupon credit checks are used they will be carefully accounted for by both the exchange officer and the exchange steward. The former will keep an accurate account of the value of both of those turned over by him to the steward for issue and those issued by the steward as shown by his daily report. The balance of credit checks or coupons outstanding will be regarded as a liability until redeemed. The steward will charge himself in his account with the value of all credit checks or coupons turned over to him by the exchange officer, and will credit himself with the value of those issued by him. All credit checks or coupons received from sales will be turned in to the exchange officer with the steward's daily report and their total value thereon verified by the exchange officer. All paper coupons so turned in will be destroyed by the exchange officer in person, preferably by burning. The stewards credit check account need not show the value of the credit checks or coupons outstanding, as this may at once be determined by balancing the credit check or coupon account of the exchange officer.

45. Credit accounts.—*a. How carried.*—Credit accounts are carried as bills receivable until they are settled or found to be a loss.

b. Action when overdue.—Monthly credit accounts of officers and others remaining unpaid on the 10th of the month following that for which they are rendered will be reported by the exchange officer to the commanding officer with a view to having the accounts settled.

SECTION VII

MISCELLANEOUS

	Paragraph
Government funds for post exchanges	46
Local provision for exchange building	47
Funds for establishing	48
Services for Government, prohibited	49
Sale of beer, wine, or intoxicating liquors	50
Purchases	51
Advice by finance officers	52
Copy of financial statement to be exhibited	53
Cashing of final statements	54
Payment for telegraph service	55
Responsibility for loss of funds	56
Reorganization	57
Final liquidation	58
Government supplies authorized	59
Repair of unserviceable books	60
Reimbursement for loss of mail or express	61
Seeds for post gardens	62
Automobiles	63
Stoppages	64
Sale of unauthorized uniform clothing prohibited	65
Prompt payment of bills	66

46. **Government funds for post exchanges.**—Buildings have been constructed and recreational activities set up at posts, camps, and stations, and both main-

tained from funds made available by the War Department. The amount of funds so made available is normally dependent on the amount included in the item, "Military Post Exchanges," in the appropriation act for the fiscal year. The language of the item generally includes the following:

> For continuing the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school, library, reading, lunch, amusement rooms, for the conduct and maintenance of hostess houses, chapels, and gymnasium, including repairs to buildings erected at private cost, in the operation of the act approved May 31, 1902, for the rental of films, purchase of slides, supplies for and making repairs to moving-picture outfits and for similar and other recreational purposes at training and mobilization camps now established, or which may be hereafter established, * * *. *Act June 30, 1921 (42 Stat. 83).*

47. Local provision for exchange building.—*a.* At posts where exchange buildings have not been provided from funds made available under the provisions of paragraph 46, the commanding officer will set apart for the use of the post exchange any suitable public building or rooms available, or with the approval of the War Department he may authorize the renting of any private building or part thereof on the reservation, the rental to be paid from the funds of the exchange, or, when sufficient post exchange funds are available and are so appropriated by the exchange council, the commanding officer may authorize a suitable temporary building to be erected for the purpose. When a temporary building is constructed wholly or in part by the labor of troops for the use of an exchange, the commanding officer is authorized to use the necessary teams and such tools, windows, sash, doors, and other material as may be on hand and can be spared by the Quartermaster Corps; but no permanent structure will be erected on a reservation without first obtaining the authority of the Secretary of War. When governmental assistance is not rendered, the cost of post exchange buildings and their maintenance will be paid from post exchange funds.

b. When troops who have established a temporary building for a post exchange from post exchange funds are transferred to another post, incoming organizations using the building thus established will pay an equitable sum for its use, but in no case a total sum greater than the cost of construction.

48. Funds for establishing.—*a.* The expense of fitting up the quarters of an exchange and procuring the necessary articles for the first stock and fixtures will be met by assessment from the funds of the several organizations which make up the membership of the exchange, or these will be contracted for, or procured on credit. When procured on credit, the bills will be paid from the first profits. The post exchange is responsible for the debt, and not the Government. This will be made perfectly clear to those extending credit.

b. The funds for the establishment of exchanges in the field will be drawn from the funds of participating organizations. Such funds will normally originate in large part from the liquidation of interests in exchanges at the home station of such organizations. A reasonable proportion of the funds of organizations will, therefore, be held available for the establishment of field exchanges. The sum thus held will normally be not less than one dollar ($1) for each man of the authorized strength of the organization.

49. Services for Government, prohibited.—The practice of obtaining occasional services for the Government from post exchanges, post laundries, and

other quasi public agencies that are established and maintained at military posts by the authority of the War Department, is authorized only in cases in which services of the same class can not be as conveniently or reasonably obtained elsewhere and where a direct advantage will accrue to the Government from the method resorted to. In no case will a post exchange or post laundry be permitted to enter into public competition or to submit bids in response to advertisements calling for proposals for furnishing supplies or services. When accounts are submitted for purchases of the kind described above the vouchers will contain a full statement of the grounds upon which the purchase of supplies or the procurement of services was based and will fully set forth all the circumstances of the transaction, with a view to enabling the proper bureau of the War Department and the General Accounting Office to determine whether the purchase was in the public interest. Public funds received for such services will be taken up in the accounts of the post exchange or post laundry and will be accounted for in the manner prescribed for such accounting.

50. **Sale of beer, wine, or intoxicating liquors.**—The sale of, or dealing in, beer, wine, or any intoxicating liquors by any person in any post exchange or canteen or Army transport, or upon any premises used for military purposes by the United States, is prohibited. Commanding officers will carry the provisions of this paragraph into full force and effect, and will be held strictly responsible that no exceptions or evasions are permitted within their respective jurisdictions.

51. Purchases.—*a. For the exchange.*

(1) Except as authorized by (2) below, all purchases of merchandise or other property for the exchange will be made by the exchange officer, who will notify all firms and individuals from whom such purchases are made that the exchange will not be liable for the payment of any bills for such merchandise or other property purchased by any other than the exchange officer in person, and that the original invoices pertaining to any such purchases must be mailed direct to the exchange officer.

(2) Exceptions to the requirements of (1) above will be made only when it is impracticable for the exchange officer to make advantageous purchases in person, e. g., from a traveling salesman who habitually visits the exchange during the absence of the exchange officer at drill or other duty, in which case purchases in limited quantities may be made by the exchange steward if authorized to do so by the exchange officer, with the approval of the exchange council and the commanding officer.

(3) Purchases made verbally by the exchange officer and those made in exceptional cases under (2) above will be confirmed in writing by the exchange officer as soon as practicable after such purchases are made.

b. For concessionaires.

(1) Merchandise needed by concessionaires in the operation of their concessions will not ordinarily be purchased for them by the exchange, but if deemed desirable to do so for any special reason the merchandise may be purchased by the exchange on its own account and then sold to the concessionaire.

(2) A concessionaire is in no sense an agent of the exchange and should not be permitted to represent himself as such to the public, e. g., by the use of the words "Post Exchange" on letter or bill heads or on signs.

(3) Commanding officers will exercise such supervision of the activities of concessionaires as will prevent the exchange from becoming involved in any controversy as to its responsibility or liability for debts contracted by concessionaires.

c. In considerable quantities.—When it is desired to buy articles in considerable quantities, the exchange officer will first obtain the approval of the exchange council.

d. Delivery and accounting for.—All goods purchased on account of an exchange will be delivered to it and properly accounted for on its books.

e. Contracts.—Contracts for supplies or merchandise once entered into between the post exchange and civilians will not be canceled except by mutual consent or in accordance with a provision of the contract. Whenever contracts or agreements for purchases are made by a post exchange which by reason of change of station of the organizations holding membership therein or other cause are changed, new contracts or agreements by their successors must be made if desired. All contracts or agreements entered into by post exchanges will contain a provision that in case it is necessary to close the exchange by reason of a change of station or otherwise all contracts or agreements entered into shall be canceled.

f. Articles obtained from the Quartermaster Corps.

(1) Commanding officers will regulate the purchase and resale of articles obtained from the Quartermaster Corps. The quartermaster is authorized to sell to the exchange at cost any subsistence stores except exceptional articles (AR 30–2200). In reselling such goods in their original forms no profit will be made by the exchange beyond the fractions of cents necessary to make change, and no such articles will be sold to civilians not authorized to purchase subsistence stores under the provisions of paragraph 2*a* (2) (*j*), AR 30–2200.

(2) A post exchange may purchase, upon the certificate of the officer in charge that they are for sale only to enlisted men of his post, in such quantities as are needed by them, the following articles of uniform clothing:

Belts, waist.	Laces (all kinds).
Chevrons (all kinds).	Leggings, canvas.
Cords:	Insignia, cap and collar.
Hat.	Stockings.
Tying, for service hats.	

Selling (except by the post exchanges) or bartering these articles purchased or drawn from the Quartermaster Corps is forbidden.

g. Federally inspected meat and meat food products.—See paragraph 4, AR 40–2150.

52. **Advice by finance officers.**—Locally available officers of the Finance Department may be consulted, and when so consulted will give advice on the financial conduct of post exchanges.

53. **Copy of financial statement to be exhibited.**—A copy of the monthly financial statement (less exhibits), with the commanding officer's action noted thereon, will be exhibited in one of the rooms of the exchange during the ensuing month.

54. **Cashing of final statements.**—*a. General.*—Post exchanges are prohibited from cashing final statements of discharged soldiers unless a finance officer is not readily accessible. No charge will be made for the accommodation, but to insure against loss due to error a part of the value of the final statement will be retained until the account is paid. The amount retained, less the cost of the transaction, will be transmitted to the soldier as soon as the actual state of the account is known.

b. Exchange not liable for overpayment.—An exchange assumes no liability for errors for overpayments to soldiers made by finance officers, the liability resting on the officer who signs the final statements or the finance officer who pays them, according to the source of the error.

55. **Payment for telegraph service.**—The telegraph expenses of a post exchange will be paid by the post exchange as an item pertaining to the cost of maintenance thereof, except that messages on post exchange business over telegraph, radio, and cable lines owned and operated by the War Department may be transmitted without charge, provided that any charges accruing on commercial connecting lines will be paid by the post exchange in whose behalf the message is sent or received.

56. **Responsibility for loss of funds.**—*a.* Post exchanges being agencies of the Government, the duties imposed upon officers in the management of exchange affairs are as binding upon them as any other duty to which they may be assigned under competent military authority and when the property or funds of an exchange are lost through mismanagement or neglect of the exchange officer or any members of the exchange council, or both, the least that can or should be exacted in the public interests is that the exchange officer and any members of the exchange council, responsible therefor, should make good the loss. *See Dig. Ops. J. A. G., 1912–1917, p. 474.*

b. In case of loss of post exchange funds or property the circumstances will be carefully investigated and reported upon by a board of three disinterested officers appointed by the post, camp, coast defense, or station commander. The board making the investigation will include in its report its opinion as to the responsibility for the loss and a recommendation as to appropriate action for the decision of the corps area commander.

57. **Reorganization.**—*a. General.*—Whenever the exchange council, by a majority vote, holds that a reorganization of the exchange is necessary, and that the interests of the exchange can best be subserved by this course, the proceedings of the council in such case, when approved by the commanding officer, will be forwarded to the corps area commander, whose decision thereon will be final.

b. Procedure.—If the proceedings are approved by the corps area commander, all members will withdraw from the exchange at the earliest possible date after the receipt of the approved proceedings at the station and the reorganization will be made effective without unnecessary delay.

58. **Final liquidation.**—When notice is received that an entire garrison of a post, camp, or station is to be withdrawn and the garrison discontinued, the merchandise stock of the post exchange will be reduced to the lowest extent

possible and, as far as may be possible, converted into cash. Prior to the departure of the troops the property of the exchange will be sold and the proceeds distributed by the council among the organizations owning stock therein according to the number of shares held by each. The exchange officer will make a final report of the closing out of the exchange, through military channels, to the corps area commander. Under the above circumstances, the liquidation of an exchange will be as gradual a process as practicable. Prior to all sale of stock at a sacrifice, the personnel of organizations participating in an exchange will be given an opportunity to buy at reduced prices. All stock and fixtures not otherwise disposed of and which can not be carried by outgoing organizations will be disposed of at public sale prior to departure of the final organization concerned in the movement of troops.

59. **Government supplies authorized.**—*a.* Heating and the issue of suitable apparatus therefor for any room, rooms, or building used by the exchanges is authorized in AR 30–1620, except that this does not include fuel for cooking and all other profit-making activities, the cost of which will be paid for by the exchanges.

b. The Quartermaster Corps will provide supplies for interior and exterior illumination. The necessary lights will be supplied for all public buildings for which illumination is required in order to make proper use of the buildings.

c. Commanding officers may, when necessary, order the issue of the necessary quantity of concentrated lye and Sapolio for buildings heated by the Government and not thus provided for. The use of concentrated lye upon floors and woodwork is forbidden.

60. **Repair of unserviceable books.**—Valuable books pertaining to a post library which have become unserviceable by fair wear and tear will, when practicable, be repaired and the cost of repair will be a proper charge against the funds of the post exchange.

61. **Reimbursement for loss of mail or express.**—See paragraph 10*b*, AR 210–50.

62. **Seeds for post gardens.**—Seeds for post gardens may be procured from post exchange funds, or from company funds.

63. **Automobiles.**—*a.* The commanding officer may authorize the purchase and use of automobiles by a post exchange, when justified by the necessities of the command.

b. When so used, they will not be permitted to compete with civilians by carrying persons not employed in the post.

64. **Stoppages.**—Authorized stoppages for amounts due post exchange will be entered on the pay rolls and deducted at times of payment.

65. **Sale of unauthorized uniform clothing prohibited.**—Articles of outer uniform clothing, including insignia, which do not conform to the types prescribed for wear by Army Regulations, will not be sold in post exchanges.

66. **Prompt payment of bills.**—Bills will be paid promptly, so that advantage will be taken of all cash discounts.

SECTION VIII

AUDITING

	Paragraph
General	67
Cash and cashbook	68
Ledger	69
Stock record	70
Miscellaneous	71

67. **General.**—The council member detailed to make the monthly audit for the exchange council will examine the accounts of the post exchange in accordance with the provisions of paragraphs 68, 69, 70, and 71.

68. **Cash and cashbook.**—*a.* Count cash on hand. If checks are with the cash, they should be current ones and should be immediately deposited.

b. Verify bank balance. Obtain a list of outstanding checks and secure direct from the depository confirmation of the bank balance.

c. Verify all additions in the cashbook. Call for steward's daily report and see that all cash items are shown on the cash book and that other items are properly accounted for.

d. Compare paid checks with stubs and the latter with the vouchers and disbursements shown by the cashbook. For all disbursements there should be a proper voucher. In case of a bill or invoice being paid that represents a purchase, it should show on its face proper notations to indicate when the goods or materials were received; that they were properly checked as to quantities, quality and prices; that they have been taken up on the books and that the voucher is correct and just.

69. **Ledger.**—*a.* Verify trial balance with ledger.

b. Postings to individual accounts in ledger should be checked against the cashbook to see that all receipts on account of credit accounts and sales have been taken up.

c. Count bills receivable (enlisted men) on hand and compare with amount shown on ledger that should be on hand. Verify whether all issues and payments to the account have been posted.

d. Check the closing entries to profit and loss account. See whether the net profit or loss is shown on the exchange account in ledger.

e. Check all postings to ledger.

70. **Stock record.**—Verify accuracy of stock record account as shown by stock record book. To the value at selling prices of merchandise on hand at beginning of month as shown by inventory, add the value at selling prices, of all merchandise purchased. This gives the total accountability. To the value, at selling prices, of all merchandise sold, returned, expended, and condemned, add the value, at selling prices, of all merchandise on hand at close of month, as shown by inventory. This gives the total credits. Subtract the total credits from the total accountability, report the results of the verification to the exchange council for action in case of discrepancies, and include results in certificate of audit in the form prescribed by paragraph 16*c*(6)(*d*), for the information of the commanding officer. Similarly verify as far as possible the accounts of all other activities (par. 5), investigating such activities from the standpoint of efficiency, the methods used, prices charged, consumption by employees, unit quantities produced by breaking up larger units (e. g., number of glasses of sodas from a gallon in bulk, number of sandwiches from a pound

of ham—a loaf of bread), system of accountability required for such smaller units, and such other matters as the investigation may develop. A report of conditions found and conclusions as to the efficiency of the operation of these activities will be submitted to the exchange council and will be embodied in the council proceedings together with a statement of the action pertaining thereto taken by the council. The verification and the investigation pertaining to such activities as prescribed herein may, at the option of the commanding officer, be delegated to an assistant auditing officer, who shall also be a member of the council.

71. **Miscellaneous.**—*a.* Verify check account to see the amount outstanding. Any balance should always appear as a liability.

b. Examine expense account and see that all expenditures were proper.

c. Obtain a list of accounts due the exchange and a list of outstanding liabilities. Verify—

(1) The completeness of same by examination of such records as ledger and bill register to insure that it includes the names of all firms and individuals with whom the exchange deals.

(2) The accuracy of same by direct confirmation, so far as practicable, with individuals and firms concerned, regardless of whether or not the balances for the month as indicated by the records are zero.

Check totals with a statement of assets and liabilities. The next auditing officer should ascertain whether any of these accounts have been settled since last audit and properly entered on the books of exchange. Make special notation of delinquent accounts due the exchange.

d. Verify all items on statement of assets and liabilities with ledger accounts, inventories, and other records, and be certain that the several items shown on the statement are correct and just.

SECTION IX

DECISIONS

	Paragraph
Post exchange funds	72
Penalty envelopes	73
Stoppages for debt	74
Post exchange as agent for laundry	75
Sales of forage to civilian polo teams	76
Taxes	77
Bus lines	78
Subsistence supplies	79
Post exchange buildings	80
Miscellaneous decisions	81

72. **Post exchange funds.**—*a.* Funds of a post exchange, although not public moneys within the meaning of sections 5488, 5490, and 5492 of the Revised Statutes, are intrusted to officers of the Army in their official capacity, and their misapplication is punishable under the Articles of War. When practicable, such part of them as is not required for immediate use should be deposited in a bank. For an officer in charge of a post exchange to lend its money to anyone would be a gross breach of trust.

b. Liability of exchange officers for loss by post exchange.—The division exchange officer and the exchange officer of a post exchange allowed the exchange steward to have the combination of the safe. The latter stole over $400 from

the safe and deserted. *Held*, that this was a violation of the Post Exchange Regulations, which provide that no employees shall have access to the cash of the exchange after it has been turned over to the exchange officer, and that the two officers who joined in such violation should bear the loss equally. *See Dig. Ops. J. A. G., June 15, 1918.*

c. An exchange officer who uses funds of the exchange in the cashing of checks does so at his peril and is responsible for any resulting loss.—An exchange officer cashed three checks which were returned with a notation thereon "not sufficient funds." A letter was addressed to the drawer of the checks, but no answer thereto was received. The action of the drawer of the checks does not constitute fraud against the exchange. The funds of the exchange, when not in use for proper exchange purposes, should be kept in a bank and not loaned or used to cash private checks and the exchange officer was without authority to cash any checks out of such funds; having done so, he assumed the risk of loss. The Government is not interested in any proceedings to recover the money or to prosecute the drawer of the checks. *Dig. Ops. J. A. G., May 17, 1919.*

d. Liability of post exchange on account of forged draft cashed by exchange officer—Post exchange; acceptance and negotiation of forged draft.—By indorsing and negotiating a forged draft, a post exchange contracts that it has lawful title thereto and the right to transfer said instrument. It thereby becomes liable to subsequent holders in due course for the face value of the bill, and the bank upon which said draft is drawn has a valid claim against the post exchange for reimbursement of the amount paid by said bank to a holder in due course. The exchange may assert its claim against the exchange officer through whose error the loss arose, but no claim can be enforced against the Government. *Ops. J. A. G., October 4, 1919.*

e. Company exchange; financial responsibility for loss caused by officer's negligence.—The post exchange officer is financially responsible for the loss of money by theft which was taken from an unlocked counter drawer where it had been placed by the exchange steward, for the reason that he failed to take over the post-exchange money from the steward on the night in question, as required by regulations. *Ops. J. A. G., October 28, 1919.*

f. Assessment of damages under the one hundred and fifth article of war against a post exchange when the actual wrongdoer can not be identified.

(1) When damages are to be assessed against soldiers under the one hundred and fifth article of war, where the board finds that the damages were committed by soldiers belonging to the command, but is unable to locate the responsibility more definitely, i. e., the particular soldiers who were the wrongdoers, or the particular organization to which they belong can not be determined, the damages may be collected from the proceeds of the post exchange in which the entire command is interested. *Ops. J. A. G., May 29, 1918.*

(2) Until the board of officers finds that damages to private property were caused by soldiers of the post, and that the organization or organizations to which they belong can not be ascertained, post-exchange funds can not be used in the payment of such claims. *See Ops. J. A. G., November 6, 1919.*

g. Use of funds.

(1) The "recreation fund" defined in paragraph 3 *e*, AR 210–50, which is a fund set aside by the post exchange under paragraph 8 *d*, (2), AR 210–65, for the education and recreation of the enlisted men of the command, may not properly be used for the construction and maintenance of an officer's club. *See Ops. J. A. G., August 20, 1925.*

(2) * * * The uses of post exchange profits authorized by * * * regulations * * * can not be held to include expenditures for the improvement of roads, however beneficial to the garrison. *Ops. J. A. G., January 14, 1925.*

h. Liability of exchange council.—* * * Where losses extending over a period of two years were caused by neglect and mismanagement, held, that the post exchange council as well as the exchange officer should be held responsible for it. *Ops. J. A. G., April 14, 1910.*

i. Liability for loss; general.—For further discussion of this subject see Digest of Opinions, J. A. G., 1912, pages 638–640.

73. **Penalty envelopes.**—*a.* The use of penalty envelopes by officers in charge of post exchanges in conducting correspondence of post exchanges is permitted for all correspondence relating to the conduct of the business thereof, but must not be extended to the carrying of merchandise.

b. Held that penalty envelopes can not be inclosed by an officer in a letter to contractor for use in returning signed vouchers. *Ops. J. A. G., June 22, 1907.*

c. The use of the penalty envelope will be strictly limited to the proper correspondence of the exchange, and will not be used in soliciting custom nor in the delivery of goods.

74. **Stoppages for debt.**—*a. Stoppage of pay of enlisted men for debt due the post exchange.*

(1) Stoppages of pay of enlisted men for debts due the post exchange are only authorized in the settlements of such debts by the finance officer when making payments to enlisted men. Such debts can only be collected from any balance due the soldier after stoppages for debts due the United States have been satisfied.

(2) Travel pay due a soldier on discharge can not be stopped to satisfy a debt due the post exchange.

(3) The amount due the post exchange by a deceased soldier is a debt, and constitutes a proper claim against his estate, and may be legally deducted from the pay and allowances due the same. Post exchanges having claims against a deceased soldier should file them directly with the General Accounting Office.

(4) I am of the opinion and so decide, that where it clearly appears that a soldier is indebted to a post exchange, such post exchange may be reimbursed the amount of such indebtness from the amount of the pay and allowances reserved by section 4818, United States Revised Statutes, from stoppages and fines adjudicated by sentence of courts-martial for the reimbursement of the Government and of individuals. *Decision of Comptroller of the Treasury.*

(5) Section 4818, United States Revised Statutes, provides: "For the support of the Soldiers' Home the following funds are set apart, and are hereby appropriated:

"All stoppages or fines adjudged against soldiers by sentence of courts-martial, over and above any amount that may be due for the reimbursement of Government or individuals. * * *"

(6) In case of a deserter (as well as in case of a discharged or a deceased soldier) who is shown to be justly indebted to the post exchange, a stoppage not exceeding the amount of credit authorized in the regulations may be lawfully made in favor of the post exchange. The decision of April 22, 1902 (21 MS. Comp. Dec. 324), is overruled. *21 Comp. Dec. 109.*

b. Collection of money due from deserter to company fund and exchange.

(1) The pay and allowances forfeited by a deserter by reason of his desertion, which are payable to the United States Soldiers' Home, is that amount to which the soldier would have been entitled had he remained in the service, i. e., whatever sum would have been due him after the payment of his just obligations to the United States and to Government agencies. (See 21 Comp. Dec. 109.) Sums due to the company fund and to the exchange, incurred in accordance with the regulations, are payable from any balance found due him at the time of his desertion, after deducting therefrom any sum in which he may have been indebted to the United States. (Ops. J. A. G., June 26, 1918.) See paragraph 2, AR 35-2440.

(2) The maximum of "one-third of his monthly pay" fixed by the regulations of the War Department as the amount of credit to which an enlisted man may be entitled in any one month at the Army post exchange is measured by the amount of pay the enlisted man would be entitled to for a full month according to his grade and length of service, although he may have actually served only a portion of the month. *3 Comp. Gen. 518.*

(3) See also paragraph 41 *c* and *d*.

75. **Post exchange as agent for laundry.**—*a.* Post exchanges can not act as agents for private laundries, for a soldier's pay can not be stopped to satisfy a claim of a private person or business concern. There is no legal objection to the post exchange hiring the laundering done by a private laundry, thus becoming the real customer of the laundry, and, in turn, charging the men just and reasonable rates for having their washing done. *Ops. J. A. G., November 8, 1917.*

b. In case of nonpayment by enlisted men for laundry work contracted for as authorized in *a* above, the pay of the defaulters may be stopped to satisfy their indebtedness to the exchange.

c. Work done for hospital.—* * * Held, that under Circular No. 29 W. D., 1923, the post exchange might enter into a contract with a civilian laundry to do the hospital laundry work, the cost to the Government being no greater than if the hospital should deal directly with the laundry, and the profit made by the post exchange being eventually shared by all the military organizations on the post, including the hospital. *Ops. J. A. G., September 29, 1923.*

76. **Sales of forage to civilian polo teams.**—Sales of forage to civilian polo teams may be met by local post exchanges purchasing forage, other than Government forage, for sale to visiting polo teams.

77. **Taxes.**—*a. Liability of post exchange to Federal taxes.*—Post exchanges are not liable to the income tax imposed by section 10, war revenue act of October 3, 1917 (40 Stat. 300, 333). While they are, in a sense, associations of military organizations for business purposes, they are nevertheless Government agencies or instrumentalities expressly recognized by Congress in the annual Army appropriation acts, and they are designed to carry out a Government purpose. It has never been the policy of the Government to tax its own enterprises or its own manner or method of doing business. (*Dugan* v. *United States*, 34 Ct. Cls. 458.) For the same reason neither post exchanges nor officers in charge thereof are liable for the payment of the internal revenue tax for the sale of tobacco imposed by the act of October 22, 1914 (38 Stat. 745, 752). Post exchanges are, however, subject to the stamp tax imposed by said internal revenue act (38 Stat. 763) and accordingly they are not permitted to sell articles of merchandise on which special tax stamps are required until such stamps have been affixed. A post exchange is also subject to the freight tax imposed by sections 500, 501 of the war revenue act of October 3, 1917 (40 Stat. 300, 314), since transportation service rendered to a post exchange is not service rendered to the United States within the exception contained in section 502 of said act. *Ops. J. A. G., April 9, 1918.*

b. Liability of post exchange to tax on admissions to places of amusement.—Post exchanges are conducted solely for the benefit of enlisted men under the supervision of the Government. No part of the proceeds derived from admission fees at places of amusements conducted by post exchanges is payable to any individual, but the entire amount thus collected is used for the benefit of enlisted men in the military service. The Commissioner of Internal Revenue construing the war revenue act of October 3, 1917 (40 Stat. 300, 318), has issued instructions that no tax should be collected for admissions to places of amusement operated by or under the supervision of the Government where no part of the proceeds is payable to individuals, but all such proceeds are exclusively for the benefit of persons in the military service. Consequently the admission fees at places of amusement conducted by such post exchanges are not subject to the war tax on admissions provided for by section 700 of said act. *Ops. J. A. G., May 17, 1918.*

c. Floor tax on tobacco.—Government agencies, such as post exchanges, are required to pay floor tax on tobacco under section 702 of the revenue act of February 24, 1919 (Pub. No. 254, Sixty-fifth Congress, p. 68). (See Dig. Ops. J. A. G. 1917, p. 459.) *Ops. J. A. G., February 28, 1919.*

d. Internal revenue on soft drinks sold at Government agencies.—As the Treasury Department has ruled in a decision dated July 24, 1919, T. D. 7, I. R. 2893, p. 31, the sales of ice cream and soft drinks sold by a municipality, post exchange, the Red Cross, or similar institutions are subject to the tax imposed by the act of February 24, 1919, 40 Stat. 1057, 1116, as the tax falls directly upon the purchaser; and this is not necessarily in conflict with the opinion of this office. *Ops. J. A. G., April, 1919, p. 181.* Since the Treasury Department is charged with the administration of the law its rulings should prevail until reversed by proper authority. *Ops. J. A. G. Aug. 23, 1919.*

e. Automobile livery business.—The tax imposed by subdivision 11 of section 1001 of the revenue act of 1921 on "persons carrying on the business of operating or renting passenger automobiles for hire" is not upon automobiles but upon the privilege of engaging in the automobile livery business. Military organizations owning automobile trucks purchased from their own funds and operating same for their own convenience and on Government business are not taxable thereunder, though a small charge is made for carrying members of such organizations to and from near-by towns, the receipts going to organization funds. *Ops. J. A. G., October 6, 1924.*

f. State taxes.—Generally, the exacting from the Federal Government of a State tax imposed on purchaser even if delivery takes place within the State, as distinguished from delivery on a reservation exclusively under Federal jurisdiction, is illegal, as infringing the right of the United States to exemption of its property and instrumentalities from all State taxation. (See 1 Comp. Gen. 229.) No such condition arises, however, where a State law imposes a tax on the dealer and such tax is included in the purchase price which the Government pays. (See 1 Comp. Gen. 584; 3 ibid. 781; 4 ibid. 1041; 5 ibid. 1022.) A post exchange is not legally liable for local or municipal taxes or licenses on the sale of commodities for the exclusive use of persons in the military service, as such exchange is an instrumentality of the Government of the United States. *Ops. J. A. G., November 21, 1899.*

78. Bus lines.—The operation by a post exchange of a motor-bus line is not an activity authorized by * * * post exchange regulations, * * * but, if its operation is authorized by the War Department, there is no legal objection thereto. *Ops. J. A. G., November 28, 1919.*

79. Subsistence supplies.—A post exchange can not legally sell at a profit food supplies obtained by it from the Quartermaster Corps where the form of such supplies is not changed by the post exchange. The only authority for the sale of such supplies by the Quartermaster Corps to a post exchange is the statutes authorizing the sale thereof to officers and enlisted men. (R. S. sec. 1144; Id. sec. 1145; 28 Stat. 658; 23 Stat. 107, 108.) Hence they can be sold to a post exchange only on the theory that the exchange acts as an agency for their distribution to officers and enlisted men at cost price. Where, however, the form of the supplies is changed by the post exchange by converting ingredients into pastries, etc., they may be sold at a profit. *Ops. J. A. G., January 28, 1919.*

80. Post exchange buildings.—*a. Title; revocable license.*—An Infantry regiment obtained due oral permission to erect and maintain an exchange building at a cantonment and to dispose of it in case of removal. Subsequently the camp commander ruled that on leaving the camp the organization must leave the building as a part of the camp property belonging to the Government. The question of title of the building under the oral license to build is a question of intent of the parties. Here the building apparently belonged to the organization that, with due authority, constructed it, and it has under the license power to sell and remove the same. Orders of the camp commander are without effect in so far as they purport to diminish the title and power of the organization in the matter of the exchange building. But the permit or license is necessarily revocable, and the camp commander may order the removal of the building at any time. *Ops. J. A. G., August 10, 1918.*

b. Buildings constructed by post exchanges; disposition.—Certain buildings erected by the post exchange upon Ellington Field, Tex., solely at the expense of the exchange, remain its property, and they may be sold by the exchange when it has no further use for them. The purchaser may remove the buildings from the reservation. The permission of the post commander is sufficient authority for their sale and removal. *Ops. J. A. G., January 22, 1919.*

c. Expenditure of profits from post exchanges for operation of barber shop.—Expenditure of the profits from a post exchange for the purpose of improving facilities for the operation of the barber shops by way of alterations and extensions of post exchange buildings and acquisition of necessary supplies for carrying on the business is a proper use of the post exchange funds, and such use is authorized by the Post Exchange Regulations. * * * *Ops. J. A. G., September 19, 1918.*

d. Removability of regimental exchange building.—A building was erected by a regimental exchange upon the understanding that it was to be the property of the exchange and to be disposed of by the exchange as its own property when the regiment should leave that post. The division commander thereafter directed that all buildings or structures on the reservation used for military purposes in connection with the camp should become the property of the United States, whether erected by persons in the military service or otherwise. The order was without effect, and the regimental exchange had authority to sell the building and give to the purchaser a good title thereto. The division commander, of course, had power to regulate its use or to require its removal from the reservation at any time. (See Dig. Ops. J. A. G., 1917, p. 473.) *Ops. J. A. G. October 1, 1918.*

81. Miscellaneous decisions.—*a. Issue of corn brooms and mops.*—A post exchange is not entitled to the issue of corn brooms and mops.

b. Membership not obligatory.—Membership in the post exchange is not obligatory on the units which go to form a garrison. *Decision of Acting Secretary of War, April 20, 1908—1366931 A. G. O.*

c. Receiving compensation.—It is highly improper for a post exchange officer to receive compensation from the post exchange fund for his service as such. *Secretary of War, August 8, 1911.*

d. Suit by or against post exchange; United States attorney to defend any litigation.—It is not the policy of the War Department to interfere in the contractual relations between post exchanges and their creditors where there is a bona fide dispute which appears to be a proper case for judicial determination * * *. (Ops. J. A. G., January 2, 1917.) * * * Litigation on behalf of the post exchange should be in the name of the exchange officer as exchange officer and on behalf of the exchange. (Ops. J. A. G., March 1, 1906.) Under A. R. 996 a post exchange officer is entitled to the legal advice or services of the local United States attorney to protect the rights and interests of the exchange. (See Ops. J. A. G., September 8, 1919.) See AR 210-75.

e. Liability to civil suit on contract.—* * * A post exchange is a voluntary unincorporated cooperative association of Army organizations, a kind of cooperative store in which all share in the benefits and all assume a position analogous to that of partners. Contracts to purchase goods entered into by the proper officers of a post exchange should be tested by the same rules of obligation which govern like agreements of individuals. In the event of

an inability on the part of a post exchange to pay its debts, the organizations which participate in the post exchange should themselves pay off all such obligations in proportion to their respective interest in the exchange. (Ops. J. A. G., June 4, 1918.) * * * The officers of a post at which a post exchange is located are not liable for its debts. (Ops. J. A. G., January 7, 1911.) * * * Where a post exchange officer was required over his protest to pay out of his private funds for certain supplies ordered, furnished, and used by the post exchange, * * * and the exchange was dissolved, * * * recommended that the post exchange officer be reimbursed * * * by the several organizations comprising the exchange at the time the indebtedness was incurred. *Ops. J. A. G., March 6, 1911; October 3, 1911.*

f. Reimbursement for loss while attempting to save property.—As property of the regimental or post exchange can not be treated as property belonging to the United States, an enlisted man whose property was destroyed while he was giving attention to saving property of the exchange is not entitled to reimbursement. *25 Comp. Dec. 960.*

g. Insurance.—Organizations which have erected recreation halls on Government land at their own expense under revocable licenses from the Secretary of War, by virtue of which they have the full right of use, occupancy, and enjoyment of such buildings until the licenses are terminated, and post exchanges which have erected buildings out of their own funds, have such an insurable interest in these buildings as will support a fire insurance policy. The consent of the United States to such insurance would add nothing to the validity of the policy, which is dependent on the facts as they exist. *Ops. J. A. G., February 16, 1924.*

SECTION X

COMPANY OR DETACHMENT

Paragraph
General 82

82. **General.**—*a.* The establishment of company or detachment exchanges is not authorized where a post exchange is established.

b. Company or detachment exchanges may be established when there is no post exchange and when in the opinion of the organization commander such exchange is desirable.

c. Company and detachment exchanges will conform as far as practicable to regulations prescribed for post exchange.

[A. G. 331.36 (5–1–29).]

BY ORDER OF THE SECRETARY OF WAR:

C. P. SUMMERALL,
General,
Chief of Staff.

OFFICIAL:
C. H. BRIDGES,
Major General,
The Adjutant General.

U. S. GOVERNMENT PRINTING OFFICE: 1929

[fol. 11a] EXHIBIT TO STIPULATION

Circular No. 57. (Cir. 57)

War Department,
Washington, October 31, 1929.

	Section
General prisoners—Changes in AR 600-375	I
Inspections of posts and camps—Changes in AR 20-10	II
Cash discounts—Changes in AR 35-6200	III
Service national standard authorized for brigades and higher units	IV
Changes in AR 210-65	V

I. General prisoners—Changes in AR 600-375.—Pending the publication of changes in AR 600-375 (Personnel—General Prisoners, General Provisions), May 19, 1923, the following changes in those regulations are published for the information and guidance of all concerned.

1. Paragraph 2a is changed to read:

2. Commanding Officer. a. General.—Full responsibility for the security, management and rehabilitation of prisoners is vested in the commanding officer, who may supplement the regulations contained herein as he may deem appropriate at the particular place of confinement, provided such supplementary instructions are formulated in accordance with these regulations, with well-established principles of security, discipline, cleanliness, efficiency, and humanity. He will assure himself by frequent inspections as to the proper enforcement of all prison regulations.

2. Paragraph 14h (as changed by paragraph 1, Section III, Circular No. 9, War Department, 1929) is rescinded and the following substituted therefor:

h. Restoration to Duty of General Prisoners.—The War Department desires to afford general prisoners serving sentences at posts the same opportunity for rehabilitation and restoration to duty as those serving sentences at a United States Disciplinary Barracks. Prison officers will, therefore, immediately after the arrival of a general prisoner and each six months thereafter, determine whether

he is suitable material for and desires restoration to duty. All general prisoners, except those convicted of felony, who are found upon examination to be mentally and physically qualified for military service, whose civil and military records warrant consideration for restoration to duty and who desire such restoration, will thereupon be designated as "probationers." In so far as local conditions permit, probationers will be given the military training referred to in paragraph 17b (1) and will be accorded the privileges authorized by paragraph 6g, AR 600-395 for probationers serving at disciplinary barracks.

A probationer may at any time after serving one-third of his sentence, and in sufficient time to permit action thereon prior to expiration of term of confinement, make written application for restoration. The application, accompanied by a statement of the probationer's civil and military record and of his physical condition will be forwarded through channels, with remarks and recommendation of the officers forwarding it, to the officer exercising general court-martial jurisdiction over the command or, where dishonorable discharge has been executed, to the Adjutant General. Recommendation as to assignment, should probationer be restored to duty, will also be made.

The provisions of this paragraph are not to be construed as impairing the right of the corps area commander or other competent authority to exercise, pursuant to A. W. 50 and 52, the power to remit or suspend the unexecuted part of a sentence and to restore the prisoner to duty at any time while the sentence is being served.

3. Paragraph 21d (1) is changed by changing (c) and adding (e) as follows:

(c) Folding arms.

(e) Requiring silence at meals, except while at attention or as a temporary disciplinary measure.

(A. G. 253 (10-7-29).)

II. Inspection of Posts and Camps—Changes in AR 20-10. —Pending the publication of changes in AR 20-10 (Inspector General's Department—Inspection of Posts and Camps), December 13, 1923, the following changes in those

[fol. 11b] regulations are published for the information and guidance of all concerned:

5. Subjects Embraced.

* * * * * * *

h. Care and treatment of general prisoners, methods pursued for their rehabilitation and the results thereof.
(A. G. 253 (10-7-29).)

III. Cash Discounts—Changes in AR 35-6200.—Pending the publication of changes in AR 35-6200 (Finance Department—Prompt Payment of Bills and Accounts), March 24, 1922, the following changes in those regulations are published for the information and guidance of all concerned:

2. Cash Discounts.—

* * * * * * *

d. (1) In general, the deduction of discounts under agreements by the Government to purchase supplies is authorized only when the vendor has made an express offer of such discounts, and a mere statement as to discounts, shown on the printed commercial bill of the vendor submitted for payment, is not generally to be regarded as such an express offer. See 23 Comp. Dec. 141; 2 Comp. Gen. 83; 5 id. 739.

(2) The decisions cited in (1) above pertain to formal contracts only. In cases of informal purchases, a statement as to cash discounts appearing on a dealer's invoice should be considered an offer of cash discount of which advantage should be taken, and any protest by a dealer against deduction of such a discount, on the ground that his bid or the procuring instrument was silent as to cash discount, or that the procuring instrument showed the price to be net, should be considered as a claim to be submitted to the General Accounting Office for direct settlement.
(A. G. 158 (10-15-29).)

IV. Service National Standard Authorized for Brigades and Higher Units.—Section IV, Circular No. 59, War Department, 1929, is amended by adding at the end thereof the following sentence:

Although not authorized for issue, silken national standards, silk individual flags, and silk distinguishing flags may

be purchased by headquarters of brigades and higher units for use on ceremonial occasions.

(A. G. 424.5 (10-18-29).)

V. Changes in AR 210-65.—Pending the publication of changes in AR 210-65 (Posts, Camps and Stations—Exchanges), June 29, 1929, the following changes in those regulations are published for the information and guidance of all concerned:

Paragraph 7½ added.

7½. Sales; to Whom Made.—Post or unit exchanges will sell to, or make purchases for the following named persons and organizations only. Purchases by individuals will be limited to those required for their own use or for the use of dependent members of their families.

a. Officers, warrant officers, and enlisted men of the Army, Navy, Marine Corps, and Coast Guard, on the active or retired list.

b. Commissioned officers of the United States Public Health Service.

c. Contract surgeons.

d. Army nurses.

e. Members of the Officers' Reserve Corps and the Enlisted Reserve Corps while on active duty.

f. Officers, warrant officers, and enlisted men of the National Guard and National Guard Reserve when in Federal service.

[fol. 11c] g. Dependent members of families of persons enumerated in a to f above, during the absence of such persons and upon written authority of the post, camp or station commander.

h. Hospital matrons.

i. Civilian employees authorized for service abroad, having a status recognized by the War Department as part of an expeditionary force.

j. Civilians employed with the Army and quartered at stations so located as to make the purchases from civilian

agencies impracticable, upon written authority of the post commander.

k. Honorably discharged officers, warrant officers, and enlisted men of the Army, Navy, Marine Corps, and Coast Guard in Army hospitals who are being cared for by and are receiving medical treatment from the United States Veterans' Bureau, upon presentation of a certificate from the regional officer or medical officer under whom they are undergoing medical treatment.

l. Officers, warrant officers, and enlisted men of the National Guard and National Guard Reserve——

(1) When in attendance at service schools or when attached to organizations of the Regular Army for routine practical instruction.

(2) When engaged in joint maneuvers with the Regular Army.

(3) When in camp at a station where exchanges are being operated.

m. Persons in actual attendance at Reserve Officers' Training Corps Camps and Citizens' Military Training Camps, at a station where exchanges are being operated.

n. Officers and crews of vessels of the Lighthouse Service and light keepers and depot keepers of the Lighthouse Service.

o. Units, and the components thereof, of——

(1) Army, Navy, Marine Corps, Coast Guard and United States Public Health Service.

(2) The Organized Reserves while on active duty.

(3) The National Guard and National Guard Reserve when in Federal Service or when engaged in joint maneuvers with the Regular Army or when in camp at a station where exchanges are being operated.

(4) Reserve Officers' Training Corps when in camps for such corps at stations where exchanges are being operated.

(5) Citizens' Military Training Camps when such camps are located at stations where post exchanges are being operated.

(A. G. 463.7 (8-15-29).)
By order of the Secretary of War.
C. B. Summerall, General, Chief of Staff.
Official.
C. H. Bridges, Major General, the Adjutant General.

[fol. 12] IN SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties entered into and signed a stipulation of facts, dated January 23, 1931, and filed it in open court July 16, 1931.

The cause came on regularly for trial July 16, 1931, before the court without a jury, U. S. Webb, Attorney General of the State of California, by H. H. Linney, appearing for the plaintiff, and Pillsbury, Madison & Sutro, by Vincent K. Butler, Jr., for the defendant. The cause having been submitted for decision, the court makes its findings of fact as follows:

Findings of Fact

I

All of the facts set forth in said stipulation of facts, filed herein July 16, 1931, are true.

Conclusions of Law

As conclusions of law from the foregoing facts, the court [fols. 13 & 13½] finds:

I

The plaintiff is entitled to take nothing by reason of its complaint.

II

The defendant is entitled to judgment against the plaintiff, together with its costs of suit.

Judgment is hereby ordered to be entered accordingly. Dated July 13th, 1932.

C. J. Goodell, Judge of the Superior Court.

[fols. 14 & 14½] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, DEPT. No. 16

No. 214,441

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, Defendant

JUDGMENT

The above entitled cause came on regularly for trial on the 16th day of July, 1931, upon an agreed statement of facts, before the court sitting without a jury, U. S. Webb, Attorney General of the State of California, by H. H. Linney, appearing for plaintiff, and Pillsbury, Madison & Sutro, by Vincent K. Butler, Jr., for defendant. The cause was submitted for decision, and the court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised:

It is ordered, adjudged and decreed that the plaintiff take nothing by reason of its complaint, and that the defendant have judgment against the plaintiff, together with the defendant's costs and disbursements incurred in said action in the sum of $2.50.

Dated July 13th, 1932.

C. J. Goodell, Judge of the Superior Court.

[fol. 15] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, DEPT. No. 16

No. 214,441

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, Defendant

OPINION

The question presented for decision is whether gasoline sold by the defendant to the Post Exchange at the Presidio

of San Francisco is taxable by the State under its Gasoline Tax Act. The sales were made by delivery in barrels and tank trucks within the boundaries of the Military Reservation. The stipulation shows that 420 gallons were sold which, at the 3 cent tax, comes to only $12.60. Despite the trifling amount involved the case has received thorough and careful attention at the hands of counsel and has been ably and exhaustively briefed for it is a novel question in this State.

The payment of the tax is resisted upon three grounds, the first being that sales in the Presidio are not within the State, the second that deliveries from San Francisco to the Presidio constitute commerce within the exclusive jurisdiction of the United States, and the third that the sales were made to a department of the Federal Government.

It is evident from the face of the Gas Tax Act that the reason for its enactment and the policy underlying it was to compel the motorists using the highways of this State to pay for the construction and maintenance of the roads [fol. 16] over which they drive. The provisions of Section 13 show this plainly. Moreover, it is common knowledge and the Supreme Court recognizes this when they say that "The clear intent of the law was to levy an excise or occupation tax upon distributors of motor vehicle fuel, giving such distributors, however, ample opportunity to fully indemnify themselves by adding the amount of the tax to the selling price of the fuel and thus in effect collect the tax from the consumer" (People v. Ventura Refining Co., 204 Cal. 286, at 294). And, as to this indirect effect of the tax upon the consumer-motorist see Old Homestead Bakery, Inc. v. Marsh, 75 Cal. App. 247, at 255-256. This is conceded by the State.

The Act (Sec. 1, c) defines the distributor to be one who sells motor vehicle fuel in this state, being careful to include those who import and then sell it here, as well as those who find it in California and sell it here.

Section 3 of the Act provides that "Every distributor shall * * * pay a license tax to the state * * * for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him *in this state*, or imported by such distributor into and distributed or sold by him *in this state* otherwise than in the original package."

We have seen that the policy underlying the legislation and the end it was invented to serve, was to make the ultimate consumer, the motorist, pay indirectly for the roads over which he travels and that in practice it works out this way. We have seen also that the statutory machinery designed as a means to accomplish this end, that is, to get the money into the hands of the State and thence into the road funds of the State and of the several counties, is a levy upon the distributor of 3 cents for each gallon of gas sold in California. In this discussion the indirect end sought [fol. 17] should not be confused with the direct means employed for its accomplishment. It is, after all, the means, i. e. the legal machinery of the thing, with which we are concerned.

Respecting the first point, then—the claim of the State that sales to the Post Exchange are sales in the State and the claim of the defendant that they are not, the position of the Attorney-General, as to the type of tax, is stated as follows: "The tax is not a sales tax, but a tax imposed upon the refiner and distributor of motor vehicle fuel, measured by the amount of such fuel distributed." To this is added: "As is well known, the tax is in effect passed on to the ultimate consumer and constitutes payment for the use of the highways of the State which are built and maintained by the State." The first statement has to do with the method by which the tax is levied, the second with its consequences. In the Act there is no legal connection or relation between the one and the other. The fact that the tax falls ultimately on the motorist by being added to the price is something with which the Act is not concerned so far as appears from its language. It simply works out that way in practice as everybody knows and as the Courts sensibly have recognized (See Ventura and Old Homestead cases, supra). However, in testing the legal question of taxability should we bring the indirect and ultimate consequences of the legislation in to the discussion?

The tax, it is agreed on all sides, is measured by the amount of gasoline distributed. The taxpayer has a right to insist that the yard-stick be not extended or prolonged beyond its statutory length, which is fuel "sold and delivered by him in the State".

The agreed facts settle the inquiry as to sale and de-
[fol. 18] livery, for they show that the sales were not consummated until delivery was effected by the transfer of the fue from the barrels and tank trucks into the containers at the Post Exchange, within the boundaries of the Presidio.

Broadly and geographically speaking, the Presidio is of course in California. But, whether it is in this State in a legal and jurisdictional sense, namely within the taxing jurisdiction of the State, is the precise question.

In the able and carefully prepared memorandum written by Colonel Graham of the Judge Advocate General's Department to the Secretary of War, dated May 3, 1930, a copy of which is part of the brief of amici curiæ, there is set forth the history of the Presidio of San Francisco substantially as it is found in the case of United States vs. Watkins, 22 Fed. 2nd 437, cited by defendant. This shows that by the Act of March 2, 1897 (Stats. 1897, p. 61) there was a cession by the State to the Federal Government of whatever jurisdiction then remained in the State. The only reservation was the usual one of the right to serve and execute civil and criminal process. The wording of the reservation respecting criminal process limiting it to that only "against any person or persons charged with crimes committed *without* said lands", indicates rather clearly an intent to surrender jurisdiction to try and to punish crimes committed within the lands ceded. An offense, then, committed in the Presidio would not be in the State and hence not cognizable by our Courts (See People v. Mouse, 203 Cal. 782). This seems to me to be a pretty good test. If exclusive jurisdiction has been transferred, how can it be said that goods delivered in the Presidio are still in the State for the purpose of measuring a tax when a theft of the same goods in the Presidio would not be "in the State" [fol. 19] for the purpose of trial and punishment.

The defendant argues that "the Presidio is as much without the State of California as any other State or foreign territory". The Government put it this way: "Federal Reservations are *islands* within the territorial jurisdiction of the States" and "The Presidio is outside the State as truly as Nevada." The "island" idea is elaborated upon in Concessions Co. v. Morris, 109 Wash. 46, 186 Pac. 655, with respect to Camp Lewis (carved out of the

State of Washington) as follows: "thereby there has been created an independent sovereignty the territory of which is surrounded by the state of Washington, but over which the state of Washington has no jurisdiction. A territory has been created which resembles that of the District of Columbia * * *". The Washington Court held that under the law of that State "only personal property in the State of Washington can be listed for taxation".

The Supreme Court of the State of Washington in the Concessions Co. case seems to have based its decision upon several grounds. The first was the constitutional ground (Art. I, Sec. 8, Cl. 17); the second, a provision exempting from taxation, found in the Washington laws of 1915, page 358; the third, the law of 1917, page 2, giving legislative consent to the donation of the land from Pierce County; the fourth, and last, a provision of Sec. 9101 of Remington & Ballinger's Codes providing that only property in the State could be listed for taxation. It would seem that only one of these grounds was necessary for the decision, and that one, the constitutional ground first mentioned. (See Surplus Trading Co. vs. Cook, 281 U. S. 647.)

The Camp Lewis Case it is true, has to do only with the taxation of personal property (movables) located within the [fol. 20] Military Reservation, which is not the question in this case, but parenthetically it might be remarked that if the State may not constitutionally tax movables found upon a Military Reservation ceded to the Federal Government, there would seem to be no valid reason why it could use personal property sold and delivered within a Military Reservation so ceded as a measure for a tax such as the one involved in this case, levied against a distributor within the State. This is only noted incidentally and in passing, and is not necessary to the discussion. Aside from that there is the purely territorial question, and in this connection the Camp Lewis Case holds in substance that a Military Reservation so ceded is no longer State territory, but becomes Federal territory. Either way the question is approached, either from the jurisdictional or territorial standpoint, it would seem that the Camp Lewis Case is authority on the subject. But, there is still higher authority.

The Surplus Trading Company case, although it does not mention the Camp Lewis case, holds substantially the

same as the Washington Supreme Court held in that case. It is interesting to note that in the opinion (at page 652 of 281 U. S.) in discussing the provision of the Federal Constitution with respect to the exercise of exclusive legislation in all cases whatsoever "over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, says that 'Exclusive legislation' is consistent only with exclusive jurisdiction. It can have no other meaning as to the seat of government, and what it means as to that it also means as to forts, magazines, arsenals, dock-yards, etc. That no [fol. 21] divided jurisdiction respecting the seat of government is intended is not only shown by the terms employed, but is a matter of public history. Why as to forts, magazines, arsenals, dock-yards etc., is the power given made to depend on purchase with the consent of the Legislature of the State if the jurisdiction of the United States is not to be exclusive and that of the State excluded? The question is not an open one. It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the State Legislature the jurisdiction theretofore residing in the State passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction." (See also U. S. v. Unzeuta, 281 U. S. 138.)

The force of the Camp Lewis case is attacked by the Attorney-General on the claimed ground that it is against the weight of authority, both Federal and State, as is pointed out in the Haynie case, 297 S. W. 822. The Attorney-General, however, frankly adds that the Haynie case was itself reversed in the Surplus Trading Co. case already discussed. The holding of the Haynie case is concisely stated at 281 U. S. 650 as follows:

"The Supreme Court of the State, although recognizing that the status of Camp Pike was as just stated and that the property on which the tax was laid was in much the greater part located therein, rejected the contention that the tax laws of the State could not be applied to property so located consistently with the constitutional provision cited."

The taxing by the State of movables within a Military Reservation was the question involved in both the Camp Lewis and the Camp Pike cases. In the former the Washington Supreme Court held that the Federal constitutional provision had to be obeyed. The Arkansas Supreme Court [fol. 22] did not consider it to be within this provision and was reversed. Any criticism, therefore, found in the Haynie case, the fate of which was reversal, seems to fall of its own weight.

It is pointed out also that the Camp Lewis case is disapproved in Grayburg Oil Co. vs. State, 286 S. W., 489. In that case it is said, in discussing the Camp Lewis case, that whatever is said therein with respect to ceded territory ceasing to be a part of the State and becoming territory of the United States was not essential to the decision. But, as in the Arkansas case, whatever criticism might be found in the Grayburg decision is, to a large extent, if not entirely, nullified by the fate that it, too, met at the hands of the Supreme Court, where it was reversed (278 U. S., 582).

I am satisfied that after exclusive jurisdiction is ceded a Military Reservation remains within the State from which it was carved only in a broad, general and geographical sense; that it becomes United States territory and that in no legal sense does it remain within the State; that it certainly is not within the State's taxing jurisdiction any more than it is within the State's criminal jurisdiction.

Adverting to the the argument based upon the recognized purpose of the Gas Tax Act, namely, to collect by taxation money for highway construction and maintenance from those who drive on the highways: it is argued that if these Post Exchange sales were not held taxable the very purpose of the law would be defeated; that those entitled to buy gas at a Post Exchange at a three cent preferential price could use our highways without helping to pay for them; and it is argued that motorists residing in the Presidio drive over the highways of California far more than they drive over the roads within the Reservation. Con- [fol. 23] ceding this to be true, the solution of the problem is not aided. That problem, as has been pointed out already, is simply as to the meaning of that part of the Statute which prescribes the machinery for the collection of the tax upon which the State has to rely, and within the

provisions of which the State must bring itself in order legally to compel payment by the taxpayer.

The Attorney-General argues that if these Post Exchange sales are not held taxable the class of persons buying gasoline from the Exchanges, little by little, will be enlarged and the revenues of the State from this source will be correspondingly reduced, to the detriment of the highways, "An inch" it is said "once conceded, will, in time, be stretched to a foot, and so on". This argument for the exertion of the taxing power so as to increase and safeguard the State's revenues may be opposed, I am tempted to say parenthetically, by an argument equally cogent on the other side, phrased in Marshall's classic words "That the power to tax involves the power to destroy". But, after all, the record in this case shows that the number of persons entitled to buy from a Post Exchange is comparatively limited and restricted and the Army authorities cannot for a moment be presumed to sanction any improper or unwarranted enlargement of this class. If this ever gets to be a serious abuse its cure lies with the Legislature and not with the Courts.

No system of taxation can be perfect. There must be inevitably, in the nature of things, hardships under every scheme of taxation, falling sometimes upon the taxpayer and sometimes upon the taxing power. No net for the [fol. 24] gathering of taxes can be made with a mesh so fine as to be absolutely impervious. Indeed, there readily comes to mind a case (of which there must be many throughout the State) where there are similar escapes. For instance, at Calexico gasoline delivered by the Standard Oil Company from a station on the California side of the border to a merchant on the Mexicali side is certainly a sale out of the State and not taxable, and yet the Mexicali merchant may fill his automobile with this gasoline and use it to drive as far over our Southern California highways as it will take him. This is precisely what happens in the Presidio, and it will not be seriously contended that a tank truck of gasoline delivered in Mexico would be a sale in this State.

The case of U. S. v. Gordy decided in the District Court of Maryland by Judge Coleman seems to involve substantially the same question as the one with which we are dealing. It is an added authority to those already cited, and

I would have been perhaps justified in simply ruling in this matter on the authority of that case. The importance of the case at bar, however, and the thorough way in which it has been briefed and presented by the Attorney-General, by counsel for the defendant, and by the amici curiæ on behalf of the Government, seemed to call for rather a fuller discussion, so that all concerned might know the reasons for the ruling.

The point just discussed is not nearly so interesting as the other two points, and because of the way in which they have been presented one is tempted to delve into the many cases cited under those heads, but time does not permit and nothing would be gained by it.

May I add again a word of keen appreciation of the way [fol. 25] in which the case has been presented. The briefs filed by all the counsel in the case have been able, thorough and exhaustive and by their full quotations they have greatly lightened the burden of research that otherwise would have been upon me.

As is already apparent, I am satisfied that the judgment should be for the defendant.

C. J. Goodell, Judge.

[fol. 26] IN SUPREME COURT OF CALIFORNIA

Bank

San Francisco No. 14739

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA (a Corp.), Defendant, Respondent

On Appeal from the Superior Court in and for the City and County of San Francisco

JUDGMENT—May 1, 1933

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged, and decreed by the Court that the Judgment of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby reversed with directions to the court below to enter judgment for plaintiff as prayed. Appellant to recover costs on appeal.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 27] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

In Bank

S. F. No. 14739

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, Defendant and Respondent

OPINION—Filed May 1, 1933

By the COURT:

This action is by the People of the State of California to recover from defendant a balance due for excise taxes imposed by the Act of 1923 (Stats. 1923, p. 571, chap. 267), as amended by the Statutes of 1927, pp. 1309 (Chap. 716) and 1565 (Chap. 795), based upon sales of gasoline to and deliveries at the Army Post Exchange located on the Presidio Military Reservation at San Francisco. The defendant had judgment in the court below and plaintiff prosecutes this appeal.

The case arises upon an agreed statement of facts, which show that beginning about July 1, 1929 and ending September 30th of the same year, defendant sold and delivered to said post exchange a certain quantity of motor vehicle fuel; that such gasoline was carried by defendant in barrels and tank trucks to the exchange and there delivered, defendant bearing the expense of and assuming the risk in such transportation; that the Presidio was established

as a military post under Spanish dominion in 1776; was continued as such by the Republic of Mexico and was ceded to the United States in 1848 by the Treaty of Guadalupe Hidalgo; that in 1850, by executive order, it was reserved for public purposes; that said order was modified in 1851, [fol. 28] from which year it has been continuously occupied by the United States as a military reservation; that, moreover on March 2, 1897, the Legislature of California ceded to the United States Government sole legislative jurisdiction over said reservation; that the Presidio Post Exchange at all times herein was an organization doing business under Army Regulation No. 210-65, dated June 29, 1929, as modified by Circular 57 of the War Department, dated October 31, 1929; that defendant duly reported said sales to the State Board of Equalization, as required, but declined to pay the tax due thereon, claiming that a sale to the post exchange was not to be considered in computing said tax.

The pertinent provisions of the said Act are: Section 1c (Stats. 1923, p. 572), which, so far as here material, defines a distributor to be one who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state (also covers other classes not here involved). Section 3 (Stats. 1923, p. 572) provides: "Every distributor shall * * * pay a license tax to the state * * * for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor *in this state* and sold and delivered by him *in this state*, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package * * *." Section 10, as amended in 1927, (Stats. 1927, p. 1309) provides for certain exemptions as follows: "The provisions of this act requiring the payment of license fees shall not be held or construed to apply to motor vehicle fuel imported into this state in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce nor to any motor vehicle fuel exported or sold for exportation and exported for use outside this state, nor to any motor vehicle fuel *sold to the government*

of the United States or any department thereof for official use of said government but every distributor shall be re- [fol. 29] quired to report such exports and sales to the state board of equalization in such detail as that board may require."

We thus have presented the question whether sales and deliveries of gasoline at a military reservation under the sole jurisdiction of the United States, made to the Army Post Exchange therein, are to be excluded in fixing the license fees to be paid by the distributor under said act of the legislature. Or, in other words, is the post exchange at the presidio military reservation in San Francisco, entitled to purchase gasoline in this state at a price less than that paid by other persons admittedly coming under the act?

It is at once conceded, as already implied, that the military reservation in question is territory over which the United States exercises sole legislative authority. U. S. v. Watkins, 22 Fed. (2) 437; Peo. v. Mouse, 203 Cal. 782. It is contended that by reason of this concession, a sale consummated on it is a sale outside the state, as tho consummated in Nevada or Oregon. It is our conclusion that the manifest intention of the act was to include all sales completed within the geographical confines of the state and for this purpose said military reservation was to be included like all other territory. The holding to the contrary in U. S. v. Cordy, 58 Fed. (2) 1013, is based upon the peculiar provisions of the act there involved under which it was held by the district court that the language of the act itself excluded sales made upon military reservations. This holding does not aid in the solution of the problem before us.

It is next urged that a sale to the Army Post Exchange is a sale to a department of the government of the United States for official use of said Government. Manifestly these sales are neither to a "department" of the Government nor for official use. The gasoline was sold to the exchange for resale to certain classes of persons for their [fol. 30] private consumption. We have no hesitation in concluding that the legislative intent was to include the sales in question in computing the tax. But these observations do not determine the cause.

We are pointed to the decision of the Supreme Court of the United States in the case of Panhandle Oil Co. v. Mis-

sissippi, 277 U. S. 218, where the court used language showing that an important question is here involved. There, as here, the State of Mississippi imposed an excise tax upon distributors of gasoline measured by sales within that state. The state sued the oil company to recover balances represented by sales to the United States for use of its Coast Guard service operating in the Gulf of Mexico and for its Veterans Hospital at Gulfport. The sales were made directly to the Government and the court held that said statute was inoperative as to them, using language in part as follows: "The States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. * * *" This was a five-four decision of the court; Justices Holmes, Brandeis, McReynolds and Stone dissented, Justice Holmes and McReynolds writing opinions.

But it seems to us that a well founded distinction may be found between the sales there involved and sales to an army post exchange. The commanding officer of an army [fol. 31] post is not required to organize the post exchange unless there is need for it unless the units present desire to participate therein or unless the personnel is sufficient to profitably maintain and support such an institution. In other words, a post exchange is at most but a government agency, designed to operate for the welfare of the troops such activities as a general store, meet or vegetable market or gasoline station, or a restaurant, gymnasium, recreation room, library or theater. Thus it is not properly described by the word "department" of the government in its activities. It is largely a cooperative institution, intended to supply the needs and promote the moral and civic betterment of the troops at the post.

It is supervised by an exchange council, composed of the commanding officers of the respective units represented in the organization. The funds of the exchange are not public

moneys within the meaning of the Revised Statutes (Rev. Stats. Sec. 5488, 90, 92). The exchange is not instituted by the aid of funds from the United States nor are its avails paid into the treasury. It is a voluntary, unincorporated, cooperative association in which all units share the benefits and all assume a position *analagous* to that of partners. In the event of the inability of the post exchange to pay its debts, the organizations which participate in it are supposed themselves to pay off all such obligations in proportion to their respective interests in the exchange. Neither the Government nor the officers of the post wherein the exchange is located are liable for its debts. The property of the post exchange is not to be treated as property belonging to the United States. The exchange itself is liable for certain Federal taxes, such as the stamp tax imposed by the Internal Revenue Act, the freight tax imposed by the War Revenue Act of 1917, a floor tax on tobacco under the [fol. 32] Revenue Act of 1919, sec. 702; sales of ice cream and soft drinks by a post exchange are subject to tax under the same act. From these and other observations that might be made, touching the nature of the organization of an army post exchange, we are of the opinion that it is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located and that it is not one of those agencies thru which the Federal government exercises its constitutional or sovereign power.

The case of Thirty-first Infantry Post Exchange v. Posadas, 54 Philippine Reports 866, 876, throws some light on the question before us. There the Post Exchange drew into question the validity of a tax levied by the Government of the Philippine Islands on sales by local merchants to the exchange. The court sustained the tax and distinguished the Panhandle Oil case, supra, and, among other distinguishing features, it pointed out the following: "There the right of the United State to make purchases was derived from the United States Constitution; here the right of the Army Post Exchange to make purchases is derived from Army regulations and Army practice. There the sale was made to instrumentalities authorized by the constitution, which consumed the merchandise; here the sales were made to Army Post Exchanges not so constitutionally authorized, which merely acted as interme-

diaries. There it must be taken for granted that the Coast Guard Fleet and the Veterans' Hospital were constructed and operated by Government funds; here, except that buildings are provided by the United States Government for the Army Post Exchange, the latter are not so constructed and operated."

Again in Keane v. United States, 272 Fed. 577, it was [fol. 33] held that a conspiracy to defraud the United States was not made out by charging a conspiracy to defraud an army post exchange. We quote the syllabus: "A military post exchange, which is a voluntary association of companies, detachments, or other army units at military posts, permitted, but not required, by a special regulation of the War Department for the purpose of conducting for the benefit of the members of such units what is in effect a co-operative store and place of entertainment, with their own funds, and for whose contracts and obligations the United States is not responsible, and in whose funds it has no interest, tho its business is conducted by an officer detailed for the purpose, held not a 'department of the government', and proof of a conspiracy to defraud a post exchange held not to sustain an indictment, under Criminal Code, sec. 37, for conspiracy to defraud the United States."

Such cases as Surplus Trading Co. v. Cook, 281 U. S. 647 and Concessions Co. v. Morris (Wash.), 186 Pac. 655 and others of that class, which relate to taxation of personal property having its situs upon a military reservation in the exclusive jurisdiction of the United States are not in point and throw little if any light upon the question here involved.

Lastly, it is contended that the deliveries from San Francisco to the Presidio reservation constitute interstate commerce within the exclusive jurisdiction of the United States and that the State of California may not impede it by this form of taxation. The transactions in question were purely intrastate. There is no force in the contention that a sale and transportation from a point in California without the [fol. 34] reservation to the exchange on the reservation is interstate commerce. We are pointed to no Federal authority to this effect and, in reason, none should exist holding that a military reservation under the exclusive legislative authority of the United States is to be considered

in the same status as the District of Columbia or Alaska, or other territory having an autonomous existence. Under the plain holding in the case of Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147, interstate commerce would not be involved even if the sales were made of gasoline to be used thereafter by persons engaged exclusively in interstate transportation of goods.

The judgment is reversed with directions to the court below to enter judgment for plaintiff as prayed.

[fol. 35] [File endorsement omitted]

[fol. 36] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

RESPONDENT'S PETITION FOR A REHEARING—Filed May 22, 1933

To the Honorable William H. Waste, Chief Justice, and to the Associate Justices of the Supreme Court of the State of California:

I

The important issue in this case is not whether soldiers at the Presidio should pay three cents a gallon more for their gasoline or whether the California legislature intended them to do so. The question of national consequence is whether the State of California, after giving exclusive jurisdiction over certain territory to the United States for [fol. 37] federal military purposes, has the power thereafter to invade that territory and impose a tax without the sovereign's consent.

This paramount issue has been passed without a word by this court, despite the fact that the opinion recognizes the exclusive character of federal jurisdiction over the Presidio and the further fact that this court, in line with rulings of the United States Supreme Court, has heretofore insisted that lands ceded to the government for military purposes are subject to federal authority alone.

In support of its first contention that sales of gasoline made in the Presidio are not subject to the state gasoline

tax, respondent argued two propositions: first, as matter of construction, the legislature did not intend to include Presidio sales because of the uniform language of the act which confines its application to sales "within this state"; and second, as matter of jurisdiction, even though the legislature had intended to reach the Presidio sales, it was wholly without power to do so.

The opinion asserts in three places that the United States Government has exclusive jurisdiction:

"On March 2, 1897, the Legislature of California ceded to the United States Government *sole legislative jurisdiction* over said reservation. * * *

[fol. 38] "We thus have presented the question whether sales and deliveries of gasoline at a military reservation under the *sole jurisdiction* of the United States * * * are to be excluded in fixing the license fees to be paid by the distributor. * * *

"It is at once conceded, as already implied, that the military reservation in question is territory over which the United States exercises *sole legislative authority.*"

Despite this recognition of exclusive federal jurisdiction, the court dismisses respondent's contention in a single sentence:

"It is our conclusion that the manifest intention of the act was to include all sales completed within the geographical confines of the state, and for this purpose said military reservation was to be included like all other territory."

The court thus confines itself to only one of the questions presented, "the intention of the act." As to the second and graver proposition, on which the opinion is silent, it appears obvious that since the court finds sole jurisdiction and power to be in the United States, there can be no state jurisdiction or power to support the local legislative intent even if it were present. Yet the decision which has been reached necessarily implies that the state had such power. The conclusion of the court, therefore, cannot be reconciled with the statements of law in its opinion on the jurisdictional question.

[fol. 39] Nor can it be reconciled with the court's ruling in People v. Mouse, 203 Cal. 782, 786 (opinion by Preston, J.):

"* * * exclusive jurisdiction has been ceded to the United States over all grounds being used for military purposes. If then the institution in question, or the grounds in connection therewith, * * * is being used for military purposes within the meaning of said act of the state of California, jurisdiction of the United States is exclusive."

If the Mouse case is law, the logic of its application to this case is inescapable. It is clear, as the trial court said, that

"an offense * * * committed in the Presidio would not be in the *State* and hence not cognizable by our courts (see People v. Mouse, 203 Cal. 782). This seems to me to be a pretty good test. If exclusive jurisdiction has been transferred, how can it be said that goods delivered in the Presidio are still in the State for the purpose of measuring a tax when a theft of the same goods in the Presidio would not be 'in the State' for the purpose of trial and punishment?"

Unless the patent inconsistency between the decision in the Mouse case and the decision in this case is removed, a state of uncertainty will be created by the conflict.

II

The opinion raises grave doubt on another score. Respondent cited decisions of the United States Supreme [fol. 40] Court and of state jurisdictions, holding that states are without power to tax tangible personal property on military reservations under the exclusive jurisdiction of the federal government. These authorities are summarily dismissed by this court as not in point. It is earnestly emphasized that they are directly in point as holding that the power to tax can be exercised only when the subject sought to be taxed is within the taxing jurisdiction.

If the state is unable to tax tangibles at the Presidio because outside of its jurisdiction, how can it levy an excise or license or privilege tax upon a transaction which this court itself describes as having taken place entirely within the Presidio and outside of state jurisdiction?

The United States Supreme Court early established in a leading case (State Tax on Foreign-Held Bonds, 82 U. S. 300, 319) that subjects of taxation, whatever their character,

must be within the jurisdiction of the taxing state, and that this rule applies to all subjects of taxation alike, whether they be persons, property or business. The court said:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and *business*. Whatever form taxation may assume, whether as duties, imposts, *excises*, or *licenses*, it must relate to one of these subjects."

[fol. 41] Whether the California gasoline tax be described as a sales tax or business tax or distributor's tax, the sale was made, the business done and the distribution accomplished entirely within the Presidio, and the state has no power to impose a license or excise tax there. Furthermore, this court has held in People v. Ventura Refining Company (204 Cal. 286), opinion by Preston, J., that the tax in effect is collected from the consumer—in this case a resident of the Presidio.

If the court's decision were to stand, it would be consistent for the assessor in San Francisco to seek to include on his rolls the tangible personalty of the officers and enlisted men at the Presidio, and indeed the real property within the reservation.

III

One further point may be noted. The United States District Court in Maryland, in United States v. Cordy, 58 F. (2d) 1013, recently ruled that, because the United States Military Reservation in Fort Meade, Maryland, like the Presidio, is exclusively federal territory, gasoline sales made there are not subject to the Maryland gasoline tax act. This court states that the federal ruling in Maryland

"is based upon the peculiar provisions of the act there in-
[fol. 42] volved, under which it was held by the District Court that the language of the act itself excluded sales made upon military reservations. This holding does not aid in the solution of the problem before us."

The "peculiar provisions" of the Maryland act are almost identical with the provisions of the California act.

Maryland imposes the tax upon the dealer in motor vehicle fuel and defines him to be "any person * * * who imports * * * gasoline * * * for use, distribution or sale and delivery in, and after the same reaches, *the State* of Maryland." The same definition is made applicable to any person producing, refining, manufacturing or compounding motor vehicle fuel *in the state* for use, distribution or sale and delivery *therein*.

The California act requires the payment of the tax "for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor *in this state* and sold and delivered by him *in this state* or imported * * * and distributed or sold * * * in *this state*."

It, therefore, cannot in justice be said that there is any language in the Maryland act differing from ours which places military reservations in a class apart or excludes sales made there. On the contrary, the provisions of the two statutes are substantially the same. If this court elects [fol. 43] to disagree with the court's reading of the plain meaning of words in the Maryland case, it cannot base its decision upon any difference in the terms of the two statutes.

IV

For the purposes of this petition, we have omitted reference to the contentions that deliveries to the Presidio are commerce within the exclusive jurisdiction of the United States, and that Post Exchanges are exempt from tax as federal instrumentalities. The first point is a corollary of the one stated in this petition; the second will be reserved for reargument if an opportunity is afforded.

Respondent respectfully petitions that this case be reheard and that this court's decision be reconsidered.

Dated San Francisco, May 19, 1933.

Pillsbury, Madison & Sutro, Felix T. Smith, V. K. Butler, Jr., Attorneys for Respondent and Petitioner.

[fol. 44] IN SUPREME COURT OF CALIFORNIA

In Bank

[Title omitted]

ORDER DENYING PETITION FOR REHEARING. Filed May 29, 1933

By the Court:

The petition for a rehearing herein is denied.
Mr. Justice Thompson voted for a rehearing.
Dated May 29, 1933.

Seawell, Acting Chief Justice.

[File endorsement omitted.]

[fol. 45] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL. Filed July 20, 1933

Petition for Appeal

Considering itself aggrieved by the final decision of the Supreme Court of the State of California in the above entitled cause, the defendant therein, Standard Oil Company of California, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said defendant, Standard Oil Company of California, assigns the following errors in the record and proceedings in the said case:

I. The Supreme Court of the State of California erred in upholding the validity of the California Motor Vehicle Fuel Tax Act, (Cal. Stats. 1923, p. 571, chap. 267, as amended by the Statutes of 1927, pp. 1308, 1565) when applied to sales of gasoline made within the territorial limits [fol. 46] of the United States military reservation at the Presidio, San Francisco, California, to the Presidio Post Exchange.

2. The Supreme Court of the State of California erred in holding that the State of California, having given to the United States exclusive jurisdiction over certain territory known as the Presidio, for the establishment of a federal military reservation, has the power thereafter to invade that territory by the imposition of a tax upon sales therein, without the sovereign's consent.

3. The Supreme Court of the State of California erred in holding that sales and deliveries of gasoline from San Francisco to the Presidio Post Exchange are subject to excise taxes imposed by the California Motor Vehicle Fuel Tax Act (Cal. Stats. 1923, p. 574, chap. 267, as amended by the Statutes of 1927, pp. 1308, 1565).

4. The Supreme Court of the State of California erred in holding that deliveries of gasoline from San Francisco to the Presidio Post Exchange do not constitute commerce within the exclusive jurisdiction of the United States upon which the State of California may not levy a tax or impose a burden.

5. The Supreme Court of the State of California erred in holding that a sale of gasoline to the Presidio Post Exchange is not a sale to a department of the Government of the United States for the official use of the Government.

6. The Supreme Court of the State of California erred in reversing the judgment of the Superior Court of the State of California, with directions to that court to enter judgment for the plaintiff as prayed.

Prayer for Reversal.

For which errors the defendant, Standard Oil Company of California, prays that the said judgment of the Supreme Court of the State of California, dated May 1, 1933, in the above entitled cause, be reversed, and that the judgment of the Superior Court of the State of California in the [fol. 47] above entitled cause, in favor of the said defendant, be affirmed, and that the defendant be awarded its costs.

Dated July 14, 1933.

Felix T. Smith, V. K. Butler, Jr., Attorneys for Appellant.

[fol. 47½] [File endorsement omitted.]

[fol. 48] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 20, 1933

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of California on the 1st day of May, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of California in the above entitled cause, as provided by law, and it is further ordered that the clerk of the Supreme Court of the State of California shall prepare and certify a transcript of the record, proceedings and judgment in this cause and [fol. 49] transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within sixty (60) days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $500.

Dated July 20, 1933.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fol. 49½] [File endorsement omitted.]

[fols. 50-51½] Bond on appeal for $500.00, approved and filed July 20, 1933, omitted in printing.

[fols. 52-54b] Citation, in usual form, showing service on U. S. Webb, filed July 20, 1933, omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD
Filed July 26, 1933

It is hereby stipulated that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

Complaint;
Answer;
Stipulation of Facts, including exhibit attached thereto, being Army Regulations No. 210 65, dated June 29, 1929, and as modified by Circular 57 of the War Department, dated October 31, 1929;
Findings of Fact and Conclusions of Law;
Judgment of the Superior Court;
Opinion of the Superior Court;
Judgment of the Supreme Court of California;
Opinion of the Supreme Court of California;
Respondent's Petition for Rehearing;
Order Denying Petition for Rehearing;
Petition for Appeal, Assignment of Errors, and Prayer for Reversal;
Statement under Rule 12;
Order Allowing Appeal;
Bond for Costs;
Citation;
Notice under Rule 12, paragraph 2, and Proof of Service; and
[fol. 56] Stipulation as to Contents of Transcript of Record.

Dated July 26th, 1933.

Felix T. Smith, V. K. Butler, Jr., Attorneys for Appellant. U. S. Webb, Attorney General of the State of California, by H. H. Linney, Deputy Attorney General.

[fol. 56½]. [File endorsement omitted.]

[fol. 57] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 15, 1933.

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this court in this case are as follows:

Point No. 1. The Supreme Court of the State of California erred in upholding the validity of the California Motor Vehicle Fuel Tax Act, (Cal. Stats. 1923, p. 571, chap. 267, as amended by the Statutes of 1927, pp. 1308, 1565) when applied to sales of gasoline, made within the territorial limits of the United States military reservation at the Presidio, San Francisco, California, to the Presidio Post Exchange.

Point No. 2. The Supreme Court of the State of California erred in holding that the State of California, having ceded to the United States exclusive jurisdiction over certain territory known as the Presidio, San Francisco, for the establishment of a federal military reservation, has the power thereafter to invade that territory by the imposition of a tax upon sales therein, without the sovereign's consent.

[fol. 59] Point No. 3. The Supreme Court of the State of California erred in holding that sales and deliveries of gasoline from San Francisco to the Presidio Post Exchange are subject to excise taxes imposed by the California Motor Vehicle Fuel Tax Act (Cal. Stats. 1923, p. 571, chap. 267, as amended by the Statutes of 1927, pp. 1308, 1565).

Point No. 4. The Supreme Court of the State of California erred in holding that deliveries of gasoline from San Francisco to the Presidio Post Exchange do not constitute commerce within the exclusive jurisdiction of the United States upon which the State of California may not levy a tax or impose a burden.

Point No. 5. The Supreme Court of the State of California erred in holding that a sale of gasoline to the Presidio Post Exchange is not a sale to a department of the Government of the United States for the official use of the Government.

Point No. 6. The Supreme Court of the State of California erred in reversing the judgment of the Superior Court of the State of California, with directions to that court to enter judgment for the plaintiff as prayed.

The appellant further states that the whole of the record, as filed, is necessary for the consideration of the case, and that all parts of the record, as filed, are deemed necessary to be printed except Army Regulations No. 210-65, of which printed copies have been supplied by the appellant in accordance with the Act of February 13, 1911, c. 47, sec. 2 (36 Stat. 901, 28 U. S. C. sec. 866) and with Rule 32, paragraph [fols. 60 & 61] 6, Revised Rules of the Supreme Court of the United States. The appellant especially states that "Respondent's Petition for a Rehearing," and the order of the Supreme Court of the State of California denying the same, are deemed necessary to be printed.

Dated August 10th, 1933.

Oscar Sutro, Felix T. Smith, V. K. Butler, Jr., Counsel for Appellant.

Due service of receipt of a copy of the within statement of points to be relied upon and designation of the parts of the record to be printed is hereby acknowledged this 10th day of August, 1933.

U. S. Webb, Attorney General of the State of California, by H. H. Linney, Deputy Attorney General.

[fol. 62] [File endorsement omitted.]

Endorsed on cover: File No. 37,950. California Supreme Court. Term No. 347. Standard Oil Company of California, appellant, vs. The People of the State of California. Filed August 15, 1933. File No. 347, O. T., 1933.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
The jurisdiction of the Supreme Court of the United States	2
The State statute the validity of which is involved	5
The date of the judgment sought to be reviewed	6

Table of Cases Cited

Concessions Co v Morris, 100 Wash 40, 170 Pac 055	4
Cudahy Co v Parramore, 263 U S 418	2
Dahnke Walker Co v Bondurant, 257 U S 282	2
Eureka Pipe Line Co v Hallanan, 257 U S 265	2
Fiske v Kansas, 274 U S 380	2
People v Mouse, 203 Cal 782, 265 Pac 944 (certiorari denied, 278 U S 644)	4
People of California v Standard Oil Co of California, 85 Calif Decisions, page 580, 22 P (2nd) 2	2
St Louis, etc, Ry Co v Wynne, 224 U S 354	2
Surplus Trading Co v Cook, 281 U S 647	4
United States v Cody, 58 F (2nd) 1013	4
United States v Uzzetta, 281 U S 138	4
United States v Watkins, 22 F (2nd) 437	4
Ward & Gow v Krinsky, 259 U S 503	2
Yellowstone Park Transp Co v Gallatin County, 31 F (2nd) 644 (certiorari denied, 280 U S 555)	4

Statutes Cited

Act of March 2, 1907 (Cal Stats 1907, p 51, c 50)	3
Act of January 31, 1928, c 14 (45 Stat 54, 28 U S C 861 (a))	2
Constitution of the United States, Article I, Section 8, Clause 3	3
Clause 12	4
Clause 14	4
Clause 18	4
California Motor Vehicle Fuel License Tax Act (Cal Stats 1923, p 571, chap 267, as amended by the Statutes of 1927, pp 1390, 1595)	1, 5
Judicial Code, Section 237 (a) (28 U S C 344 (a))	2

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 347

STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, APPELLANT,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, APPELLEE.

STATEMENT UNDER RULE 12.

This suit was originally brought in the Superior Court of the State of California, in and for the City and County of San Francisco, for $12.60 alleged to be due to the State as an excise tax under the provisions of the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, chap. 267, as amended by the Statutes of 1927, pp. 1360, 1565) upon the sale of certain gasoline, made entirely *within* the territorial limits of the United States military reservation at the Presidio, San Francisco, California, by the defendant to the Presidio Post Exchange, a post exchange doing business under the regulations of the War Department of the United States.

The Superior Court gave judgment for the defendant. On appeal to the Supreme Court of the State of California, that court reversed the judgment of the Superior Court with directions to enter judgment for the plaintiff as

prayed. The opinion of the court has not yet been officially reported, but is printed in 85 California Decisions, page 559, and 22 P. (2d) 2.

1. The Jurisdiction of the Supreme Court of the United States.

The appellant submits that this Court has jurisdiction to review upon appeal the judgment of the Supreme Court of the State of California in this case under the provisions of subdivision (*a*) of Section 237 of the Judicial Code (28 U. S. C. Sec. 344 (*a*)), and Section 1 of the Act of January 31, 1928, c. 14 (45 Stat. 54; 28 U. S. C. Sec. 861*a*).

The case is one in which there is drawn in question the validity of the California Motor Vehicle Fuel License Tax Act, on the ground of its being repugnant to the Constitution of the United States, and in which the decision of the Supreme Court of the State of California is in favor of the validity of the statute.

More specifically, the appellant challenges on constitutional grounds the validity of the statute as the Supreme Court of California has applied it to the transaction involved in this case. It is settled that the unconstitutional application of a State statute to a particular transaction by the highest court of that State is a ground of review on appeal by the Supreme Court of the United States under the statutes quoted above.

Fiske v. *Kansas*, 274 U. S. 380, 385;

Cudahy Co. v. *Parramore*, 263 U. S. 418, 422;

Ward & Gow v. *Krinsky*, 259 U. S. 503, 510;

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 288-290;

Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265, 270-271;

St. Louis, etc., Ry. Co. v. *Wynne*, 224 U. S. 354, 359.

In applying the Motor Vehicle Fuel License Tax Act to the sale in question, the Supreme Court of California held that the State of California, having by legislative act* given to the United States exclusive jurisdiction over the territory known as the Presidio, for the establishment of a Federal military reservation, has the power thereafter to invade that territory by the imposition of a tax upon sales therein, without the sovereign's consent. The appellant contends that the imposition of such a tax by the State of California was an assumption of jurisdiction to tax in territory not within the State, and was an attempted regulation of commerce passing beyond the boundaries of the State in violation of the commerce clause of the Constitution of the United States (Const. Art. I, Sec. 8, cl. 3). The appellant contends also that the imposition of such a tax by the

*This was the Act of March 2, 1897 (Cal. Stats. 1897, p. 51, c. 56), which provided:

> "An Act ceding to the United States of America jurisdiction over all lands within this State which have been or may hereafter be acquired by the United States for military purposes.
>
> SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; *and provided further*, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully

State of California was an interference with a governmental function and governmental agency, in violation of clauses 12, 14 and 18 of Section 8, of Article I of the Constitution of the United States. In any event, the appellant contends that the statute, as construed by the Supreme Court of California to apply to a sale and delivery of gasoline from San Francisco to the Presidio Post Exchange, is a tax upon commerce within the exclusive jurisdiction of the Government of the United States.

These questions were raised in the Supreme Court of California in the briefs and in the petition for rehearing. In reversing the judgment of the superior court and directing judgment for the plaintiff, the Supreme Court of California directly decided in favor of the validity of the statute as against the contention that its application to the facts of the case was unconstitutional.

---

issue under the authority of this State against any person or persons charged with crimes committed without said lands."

A sufficient description by metes and bounds and a map and plat of the territory were filed as required in the office of the County Recorder of the City and County of San Francisco.

Construing this and similar acts, the courts have uniformly held that "exclusive jurisdiction" means just what the words say. See *United States* v. *Watkins*, 22 F. (2d) 437, fixing the status of the Presidio military reservation; and, with reference to similar acts: *United States* v. *Unzeuta*, 281 U. S. 138; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647; *People* v. *Mouse*, 203 Cal. 782, 265 Pac. 944 (certiorari denied, 278 U. S. 614); *Concessions Co.* v. *Morris*, 109 Wash. 46, 186 Pac. 655; *Yellowstone Park Transp. Co.* v. *Gallatin County*, 31 F. (2d) 644 (certiorari denied, 280 U. S. 555); *United States* v. *Cordy*, 58 F. (2d) 1013.

2. The State Statute the Validity of Which is Involved.

The California Statute the validity of which is drawn in question by the judgment of the Supreme Court of the State of California from which this appeal is taken, is the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, Chap. 267, as amended by the Statutes of 1927, pp. 1309, 1565). Section 3 of the Act, so far as material to this case, provides:

> "Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and thereafter acquired by such distributor in the original package * * *."

Section 1 (*c*) defines "Distributor" as one who sells motor vehicle fuel "in this State."

Section 10, as amended by California Statutes of 1927, p. 1309, provides that the Act shall not apply "to any motor vehicle fuel sold to the Government of the United States or any department thereof for official use of said Government."

By the California Statutes of 1927, p. 1565, the tax was raised to three cents per gallon.

3. The Date of the Judgment Sought to be Reviewed.

The judgment of the Supreme Court of the State of California, which reversed the judgment of the superior court

and directed judgment to be entered for the plaintiff as prayed, was entered May 1, 1933. A petition for rehearing was denied May 29, 1933, and the judgment therefore became final May 31, 1933. (Rule 30, Sec. 1 of the Rules of the Supreme Court of the State of California.)

Dated July 17, 1933.

Respectfully submitted,

FELIX T. SMITH,
V. K. BUTLER, JR.,
Attorneys for Appellant.

FILE COPY

FILED
DEC 21 1933
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 347

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLANT.

OSCAR SUTRO,
FELIX T. SMITH,
VINCENT K. BUTLER, JR.,
Standard Oil Building, San Francisco,
Attorneys for Appellant.

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Specification of errors	5
Summary of argument	6
Argument	7
I. California has ceded to the United States exclusive jurisdiction over the Presidio. It is now without power to invade that jurisdiction by seeking to impose a tax within it	7
II. If the sale here under review be regarded as one initiated in territory under California jurisdiction and concluded in territory under federal jurisdiction it constitutes commerce within the exclusive jurisdiction of the United States	20
(a) Decisions sustaining a tax upon withdrawal, storage or use of gasoline within a state have no application here	21
(b) Decisions sustaining a tax upon property situated or sales made within a state have no application here	23
(c) The California law exempts "any motor vehicle fuel exported . . . outside this state"	26
(d) The status of the Presidio is similar to that of the District of Columbia; and a state cannot burden or regulate commerce passing between it and the District	27
(e) The commerce clause is not confined to commerce between states	29
III. The California gasoline tax does not apply to motor vehicle fuel sold to the government of the United States or any department thereof for the official use	

Page

of the government. The Presidio post exchange is a department of the United States Army, performing an official function of the federal government 30

(a) Summary of War Department regulations governing post exchanges 31

(b) History and development of post exchanges 33

(c) States cannot tax sales to federal agencies 34

(d) The California gasoline tax comes directly within the prohibition enforced by this court in the Panhandle Oil Company case 36

Conclusion 40

Appendix i

I. Pertinent sections of the California motor vehicle fuel license tax act i

II. Decisions and rulings on the post exchange as a federal agency iv

(a) In three cases it has been held that the post exchange is a federal agency iv

(b) The War Department and the Judge Advocate General have consistently ruled that the post exchange is a federal agency viii

(c) The Navy Department's ruling follows that of the Army xi

(d) Analysis of two cases which challenge the character of the post exchange as a federal instrumentality xiv

Table of Authorities Cited

Cases

	Pages
Arlington Hotel Co. v. Faut, 278 U. S. 439	18
Arlington Hotel Co. v. Faut, 176 Ark. 613	18
Bowman v. Continental Oil Co., 256 U. S. 642	22
Concessions Company v. Morris, 109 Wash. 46	17, 27
County of Butte v. Merrill, 141 Cal. 396	27
Crew Levick Co. v. Pennsylvania, 245 U. S. 292	26
Dugan v. United States, 34 Ct. Cl. 458	30, iv, viii, ix
Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147	23
Edelman v. Boeing Air Transport, Inc., 289 U. S. 249	21
Gratiot v. United States, 4 How. 80	30
Grayburg Oil Co. v. State, 286 S. W. 489, 3 S. W. 2nd 427	36
Grayburg Oil Co. v. State, 278 U. S. 582	36
Hanley v. Kansas City Southern Railway Co., 187 U. S. 617	7, 29
Hart v. State, 100 Md. 595	29
Hart Refineries v. Harmon, 278 U. S. 499	22
Interstate Transit Co. v. Lindsey, 283 U. S. 183	25
Keane v. United States, 272 Fed. 577	xiv
Kurtz v. Moffett, 115 U. S. 487	30
Ladd, In re, 74 Fed. 31	16
Maddux v. United States, 20 Ct. Cl. 193	30
Nashville, Chattanooga and St. Louis Rwy. v. Wallace, 288 U. S. 249	21
Old Homestead Bakery, Inc. v. Marsh, 75 Cal. App. 247	37
Panhandle Oil Company v. Mississippi, 277 U. S. 218	34, xiv, xvi
People v. Mouse, 203 Cal. 782	11
People v. Standard Oil Co., 85 Cal. Dec. 559	1
People v. Ventura Refining Co., 204 Cal. 286	36
Post Exchange, 31st Inf. v. Kinney, R. G. No. 30920, Aug. 28, 1929	vii

Pages

Reed, Ex Parte, 100 U. S. 13 30
Robbins v. Shelby Taxing District, 120 U. S. 489 28

Smith v. Whitney, 116 U. S. 167 30
State Tax on Foreign Held Bonds, 82 U. S. 300 14
Storaasli v. Minnesota, 283 U. S. 57 25
Stoutenburgh v. Hennick, 129 U. S. 141 ..... 7, 27
Surplus Trading Company v. Cook, 281 U. S. 647 ..... 6, 12

Thirty-First Infantry Post Exchange v. Posadas, 54 Phil. 866, 283 U. S. 839 xvii

United States v. Batemen, 34 Fed. 86 8
United States v. Cordy, 58 F. (2d) 1013 18
United States v. Eliason, 16 Pet. 291 30
United States v. Freeman, 3 How. 556 30
United States v. Unzeuta, 281 U. S. 138 ..... 6, 15
United States v. Watkins, 22 F. (2d) 437 ..... 4, 8

Washington Electric R. Co. v. Waller, 289 Fed. 598 29
Woog, Administrator, v. United States, 48 Ct. Cl. 80 .....30, vi

Yellowstone Park Transportation Co. v. Gallatin, 31 F. (2d) 644, 280 U. S. 555 17

Statutes

	Pages
Arkansas Statutes (Acts 1903, p. 52)	18
Calif. Acts of Cession:	
Cal. Stats., 1891, p. 262	8
Cal. Stats., 1897, p. 51	3, 6, 9, 10
Calif. Motor Vehicle Fuel License Tax Law (Cal. Stats. 1923, p. 571 as amended by Cal. Stats. 1925, p. 659, and Cal. Stats. 1927, pp. 1308, 1565	2, 5, 6, 30, 37, xiii
Section one	i
Section three	2, 11, ii
Section ten	26, 30, 37, iii
Section eleven	22, iii
Cal. Stats. 1929, pp. 112, 367, 955, 1551	30
Criminal Code of U. S., Sec. 30 (Comp. St. 10201)	xv
Maryland Gas Tax Law (Bagby's Ann. Code, Art. 56, secs. 211-223)	18
United States Compiled Statutes, Ann. Supplement 1919, sec. 6204d	xvi
United States Constitution:	
Art. I, Sec. 8, Cl. 3	7
Art. I, Sec. 8, Cl. 12, 13, 14	30
Art. I, Sec. 8, Cl. 17	6, 13
Art. II, Sec. 2	30
United States Revised Statutes, sec. 5440	vii
United States Statutes at Large:	
9 Stat. 922	8
14 Stat. 336	34
16 Stats. 319	4, 30
18 Stat. 337	4, 30
27 Stat. 178	xv
27 Stat. 426	34
32 Stat. 937, 938	31
33 Stat. 270, 836	31
34 Stat. 253, 1169	31
35 Stat. 119, 516, 744	31
35 Stat. 768	xi
36 Stat. 255, 1050	31
37 Stat. 582, 619, 715	31
38 Stat. 364, 1076	31
39 Stat. 636	31
40 Stat. 56, 195, 363, 479, 830, 862, 1029	31

United States Statutes at Large (cont'd):	Pages
40 Stat. 300	ix
40 Stat. 1057, 1128	x
41 Stat. 118, 963, 4184	31
42 Stat. 83, 719, 1056, 1167, 1380	31
43 Stat. 480, 711, 895	31
44 Stat. 190, 256, 1408	31
45 Stat. 49, 329, 1352	31
Washington Statutes, Rem. & Bal. Code, sec. 9101	17

Miscellaneous

	Pages
Army Regulations 210-65	4, 31, 35, viii
Army Regulations 210-50	32
Articles of War, Sec. VIII, Art. 3, Sept. 20, 1776	33
General Order No. 10, Adj. Gen. Off., Feb. 1, 1889	34
General Order No. 46, Hdqo. Army, July 25, 1895	34
Hearings, House and Senate, 69th Cong., Vol. 2, pp. 712, 740	39
Opinions, Att. Gen., Vol. 6, p. 577	38
Ops. J. A. G., Dig. Rev. Ed. 1901, p. 559	viii
Ops. J. A. G., Dig. July 1912-Apr. 1917, p. 457	viii
Ops. J. A. G., 40-100, Dec. 30, 1914	ix
Ops. J. A. G., 40-100, Jan. 20, 1915	ix
Ops. J. A. G., Dig. Apr. 1918	ix
Ops. J. A. G., Vol. II, 1918, p. 371	ix
Ops. J. A. G., Dig., 1919, pp. 181, 320, 465	x
Ops. J. A. G., Feb. 28, 1919	35
Ops. J. A. G., Dig. 1922, p. 45	35
Ops. J. A. G., 012.412, Sept. 25, 1923	35
Ops. J. A. G., Dig. 1924, p. 17	x
Ops. J. A. G., 1929, p. 11	x
Ops. J. A. G., 463.7, Sept. 21, 1929	40
Regulations, Navy Dept. 1035-1040	vi
War Dept. Circular 57, Oct. 31, 1929	31
War Dept. J. A. G. O., July 19, 1929	xii
Willoughby, Const. of the U. S., p. 1566	30

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 347

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the Supreme Court of California (R. p. 68) is reported in 85 Cal. Dec. 559,* 22 P. (2d) 2. The opinion of the Superior Court of the State of California (R. p. 59) is unreported.

*The reference is to "California Decisions," the unofficial advance publication of the opinions of the Supreme Court of California. The case has not yet appeared in the official reports.

JURISDICTION.

The required statement as to jurisdiction in support of the appeal has been filed. Probable jurisdiction was noted on October 9, 1933.

QUESTION PRESENTED.

The Presidio at San Francisco is a United States Military Reservation. Exclusive jurisdiction over it has been ceded to the federal government by the State of California. This case involves the question whether the state, after such cession, has power to impose its gasoline tax in the case of sales made in the Presidio to the Army Post Exchange.

STATUTES INVOLVED.

The taxing statute involved is The California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, chap. 267, as amended by Cal. Stats. 1925, p. 659, Stats. 1927, pp. 1308, 1565). The basic provision is in Section 3:

> "Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor *in this state* and *sold and delivered by him in this state,* or imported by such distributor into and distributed or *sold by him in this state* otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle

fuel imported into this state and thereafter acquired by such distributor in the original package . . ."*

The final act of cession of the Presidio by California to the United States is the act of 1897 (Cal. Stats. 1897, p. 51):

"Section 1. The state of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this state now held, occupied, or reserved by the government of the United States for miliary purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; Provided, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; and provided further, that this state reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this state against any person or persons charged with crimes committed without said lands. . . ."

It is stipulated that the description and map required by the act of cession was duly filed (R. p. 6).

STATEMENT.

This cause was tried upon an agreed statement of facts which may be summarized briefly. During the course of the year 1929, appellant sold and delivered a quantity of gasoline to the United States Army Post Exchange located on the Presidio military reservation at

*Other sections of the act deemed relevant are reproduced in the Appendix, pp. i-iv, *infra*.

San Francisco. The State of California seeks to impose the state gasoline tax on this sale. In the stipulation of facts it is recited that the gasoline was "sold and delivered to the Presidio Post Exchange at the Presidio" (R. p. 4); that it "was carried by the defendant in barrels and by tank trucks to the Presidio Post Exchange; and in making delivery the defendant (appellant) bore the expense and risk of loss" (R. p. 5); and that "the place of sale and delivery of said gasoline was and ever since (March 2, 1897) has been held, occupied and reserved by the Government of the United States for military purposes and defense" (R. p. 5). The place where the sale was consummated and title passed is thus established as being within the Presidio.

Under the statute which we have quoted, the United States has exclusive jurisdiction over the Presidio for all purposes. An outline of the history of the Presidio and the manner in which this jurisdiction was acquired is contained in *United States v. Watkins*, 22 F. (2d) 437, reference to which is hereafter made.

The Presidio Post Exchange is organized under and does business pursuant to and in accordance with War Department Regulations (R. p. 5). The promulgation of these regulations is authorized by statute (16 Stats. p. 319; 18 Stats. p. 337). The Exchange is thus a creature of Congress, operated as a part of the United States Army under regulations of the Secretary of War, promulgated on behalf of the President as Commander in Chief of the Army. Its uses are official, its operations are precisely restricted and sales can be made only to members of the army, except in remote outposts where civilian employees engaged in army work have no other source of supply (R. p. 56).

The trial court held that the state was without power to impose the tax on the sale to the Presidio Post Exchange, on the ground that the Presidio is not within the state in either a territorial or a jurisdictional sense, exclusive jurisdiction having been ceded to the United States.

On appeal, the Supreme Court of California reversed the trial court, holding that it was the intention of the California legislature to reach the sale in question, and that the Post Exchange is not entitled to exemption as a department of the army performing an official function of the federal government.

The State Supreme Court's opinion is silent on the question whether, even if the legislature had intended to impose the tax, the state had power to invade federal jurisdiction.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of California erred:

1. In upholding the validity of the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, chap. 267, as amended by Cal. Stats. 1925, p. 659 and Cal. Stats. 1927, pp. 1308, 1565), when applied to sales of gasoline made within the territorial limits of the United States military reservation at the Presidio, San Francisco, California, to the Presidio Post Exchange.

2. In holding that the State of California, having given to the United States exclusive jurisdiction over certain territory known as the Presidio, for the establishment of a federal military reservation, has the power

thereafter to invade that territory by the imposition of a tax upon sales therein, without the sovereign's consent.

3. In holding that sales and deliveries of gasoline from San Francisco to the Presidio Post Exchange are subject to excise taxes imposed by the California Motor Vehicle Fuel Tax Act (Cal. Stats. 1923, p. 571, chap. 267, as amended by Cal. Stat. 1925, p. 659 and Cal. Stat. 1927, pp. 1308, 1565).

4. In holding that deliveries of gasoline from San Francisco to the Presidio Post Exchange do not constitute commerce within the exclusive jurisdiction of the United States upon which the State of California may not levy a tax or impose a burden.

5. In holding that a sale of gasoline to the Presidio Post Exchange is not a sale to a department of the government of the United States for the official use of the government.

6. In reversing the judgment of the Superior Court of the State of California, with directions to that court to enter judgment for the plaintiff as prayed.

SUMMARY OF ARGUMENT.

1. California has ceded to the United States exclusive jurisdiction over the Presidio. It is now without power to invade that jurisdiction by seeking to impose a tax within it.

U. S. Const., Art. I, Sec. 8, Cl. 17;
Cal. Stats. 1897, p. 51;
Surplus Trading Company v. Cook, 281 U. S. 647;
United States v. Unzeuta, 281 U. S. 138.

2. If the sale here under review be regarded as one initiated in territory under California jurisdiction and concluded in territory under federal jurisdiction it constitutes commerce within the exclusive jurisdiction of the United States.

U. S. Const., Art. I, Sec. 8, Cl. 3;
Stoutenburgh v. Hennick, 129 U. S. 141;
Hanley v. Kansas City Railway Co., 187 U. S. 617.

3. The California gasoline tax does not apply to motor vehicle fuel sold to the government of the United States, or any department thereof, for the official use of the government. The Presidio Post Exchange is a department of the United States army, performing an official function of the federal government.

(See pp. 30-40, and Appendix pp. iv-xviii, *infra.*)

ARGUMENT.

I.

CALIFORNIA HAS CEDED TO THE UNITED STATES EXCLUSIVE JURISDICTION OVER THE PRESIDIO. IT IS NOW WITHOUT POWER TO INVADE THAT JURISDICTION BY SEEKING TO IMPOSE A TAX WITHIN IT.

It appears from the statement, page 4, *supra*, that the sale involved in this action was made in the Presidio. In this regard the trial court said (R. p. 62):

> "The agreed facts settle the inquiry as to sale and delivery, for they show that the sales were not consummated until delivery was effected by the transfer of the fuel from the barrels and tank trucks into the containers at the Post Exchange, within the boundaries of the Presidio."

The United States has exclusive jurisdiction over the Presidio for all purposes. An outline of the history of

the Presidio and the manner in which this jurisdiction was acquired is given in the following extracts from the opinion of the United States District Court for the Northern District of California, in *U. S. v. Watkins*, 22 F. (2d) 437:

"The Presidio of San Francisco has been known as such since some 35 years prior to United States occupation, in use both by Mexican and American governments as a military reservation. By the Treaty of Guadalupe Hidalgo (9 Stat. 922) it, with the rest of the territory comprising the state of California, was ceded to the United States, and in 1850, on the admission of California into the Union, passed without reservation of jurisdiction, to the state of California, the proprietary ownership remaining in the United States. In 1888, in this circuit, an indictment charging the crime of murder committed within the Presidio reservation, was quashed by Circuit Judges Sawyer and Hoffman. The court said: 'We know of no other act of the state of California, through its Legislature or otherwise, by which a retrocession of its sovereign jurisdiction over the Presidio military reservation has been made to the United States. The result is the Presidio reservation is not within the exclusive jurisdiction of the United States. (United States v. Bateman, C. C. 34 F. 86)'

"It is apparent that, for jurisdiction of the United States to have become exclusive, or qualified, since the decision in the Bateman Case, it is necessary that a retrocession of jurisdiction from the state of California to the United States has been made; the extent and nature of the jurisdiction thus ceded depending upon the terms of the grant. In seeming recognition of this fact, the Legislature of the state enacted, in 1891 (St. 1891, p. 262), the following statute:

"'Section 1. The state of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this state and the service of civil process therein.'

"That evidently the act of 1891 was thought insufficient to confer exclusive jurisdiction in the United States, for in 1897 we find the state legislature again passing upon the subject in the following language:

"'Section 1. The state of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this state now held, occupied, or reserved by the government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes: Provided, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; and provided further, that this state reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this state against any person or persons charged with crimes committed without said lands.' . . .

"Proof adduced at the trial shows that the Presidio lies within the city and county of San Francisco, and that a map of the Presidio, as then constituted, was filed for record in the office of the recorder of the city and county of San Francisco some time in 1897. . . .

> "We have, then, an act of cession of the state of California, with conditions attached. The conditions are shown to have been complied with by the beneficiary, the United States."

The court concludes:

> "We think there can be no doubt about the question, and therefore hold that *the Presidio of San Francisco is under the exclusive jurisdiction of the United States.*"

In the cession of jurisdiction to the United States the State of California reserved no authority of any kind except the right to serve and execute civil and criminal process. In some state grants to the federal government for national parks or other purposes, reservations of the right to tax and of other governmental functions have been made, but this is not the case with the Presidio. The United States must be recognized as having exclusive jurisdiction for all purposes, and since this is so, the Presidio is as much without the State of California as any other state or foreign territory.

The trial court analyzed the effect of cession to the United States in the following manner (R. p. 62):

> ". . . by the Act of March 2, 1897 (Stats. 1897, p. 51) there was a cession by the State to the Federal Government of whatever jurisdiction then remained in the State. The only reservation was the usual one of the right to serve and execute civil and criminal process. The wording of the reservation respecting criminal process limiting it to that only 'against any person or persons charged with crimes committed *without* said lands,' indicates rather clearly an intent to surrender jurisdiction to try and

to punish crimes committed *within* the land ceded. An offense, then, committed in the Presidio would not be in the *State* and hence not cognizable by our courts (see *People v. Mouse*, 203 Cal. 782). This seems to me to be a pretty good test. If exclusive jurisdiction has been transferred, how can it be said that goods delivered in the Presidio are still in the State for the purpose of measuring a tax when a theft of the same goods in the Presidio would not be 'in the State' for the purpose of trial and punishment?"

In the State Supreme Court appellant argued, first, that as matter of construction the legislature did not intend to include Presidio sales because of the uniform language of the taxing act which confines its application to sales "in this state,"* and second, that as matter of jurisdiction, even though the legislature had intended to reach the Presidio sales, it was wholly without power to do so because of the state's surrender of jurisdiction.

The Supreme Court of California has stated at three different places in its opinion** that the Presidio is under

---

*Section 3 of the California Motor Vehicle Fuel License Tax Act provides:

"Every distributor shall * * * pay a license tax to the state * * * for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package."

Section 1 (c) of the act defines the distributor as one who sells motor vehicle fuel in this state.

**The State Supreme Court says:

"On March 2, 1897, the legislature of California ceded to the United States government sole legislative jurisdiction over said reservation. . . ." (R. p. 69).

"We thus have presented the question whether sales and deliveries of gasoline at a military reservation under the *sole jurisdiction* of the

the exclusive jurisdiction of the United States (R. p. 70). This would seem in itself to exclude jurisdiction of the State of California, yet the State Supreme Court, without even making effort to show how the state could have power in the matter, held that the statute was applicable to sales in the Presidio simply because it was the intention of the California Legislature that it should apply. The decision, therefore, is contradictory on its face in holding that the statute applies to a subject matter over which the state is admitted to have no jurisdiction.

The decision is also contrary to the cases in which this court has recognized and protected the exclusive character of federal jurisdiction over military reservations. In *Surplus Trading Company v. Cook*, 281 U. S. 647, the State of Arkansas had ceded land to the United States for a military reservation with the single proviso that the grant of jurisdiction should not prevent execution of any process of the state, civil or criminal, upon any person who might be on the reservation. The condition in the California legislative act of cession is substantially the same.

The question in the *Surplus Trading Company* case was whether private personal property located on the reservation might be taxed by the State of Arkansas. The Supreme Court of Arkansas, like the Supreme Court

---

United States . . . are to be excluded in fixing the license fees to be paid by the distributor. . . .

"It is at once conceded, as already implied, that the military reservation in question is territory over which the United States exercises *sole legislative authority*" (R. p. 70).

Despite this recognition of exclusive federal jurisdiction, the State Supreme Court dismisses appellant's contention in a single sentence:

"It is our conclusion that the manifest intention of the act was to include all sales completed within the geographical confines of the state, and for this purpose said military reservation was to be included like all other territory" (R. p. 70).

of California in this case, recognized the exclusive jurisdiction of the government of the United States but failed to acknowledge the force of the contention that the tax laws of the state could not be applied to property so located consistently with Article I, Section 8, Clause 17 of the Constitution of the United States.

This court reversed the Supreme Court of Arkansas and held that on account of the unqualified grant of jurisdiction, the state had surrendered its right to levy a tax within the reservation. This court said (p. 651):

> "As respects such a military reservation—that is, one which is neither excepted from the jurisdiction of the state at the time of her admission nor established upon lands purchased therefore with the consent of her legislature—*the state undoubtedly may cede her jurisdiction to the United States and may make the cession either absolute or qualified as to her may appear desirable, provided the qualification is consistent with the purposes for which the reservation is maintained and is accepted by the United States. And where such a cession is made and accepted it will be determinative of the jurisdiction of both the United States and the state within the reservation.*
>
> "But Camp Pike is not in the same class with any of the reservations of which we have spoken and should not be confused with any of them. Nor should it be confused with military or other reservations within a Territory of the United States. It is not questioned, nor could it well be, that Camp Pike comes within the words 'forts, magazines, arsenals, dock-yards, and other needful buildings' in the constitutional provision. The land therefor was purchased by the United States with the consent of the legislature of the State in 1917. The constitutional

provision says that Congress shall have power to exercise 'exclusive legislation in all cases whatsoever' over a place so purchased for such a purpose. 'Exclusive legislation' is consistent only with exclusive jurisdiction. It can have no other meaning as to the seat of government, and what it means as to that it also means as to forts, magazines, arsenals, dock yards, etc. That no divided jurisdiction respecting the seat of government is intended is not only shown by the terms employed, but is a matter of public history. Why as to forts, magazines, arsenals, dock yards, etc., is the power given made to depend on purchase with the consent of the legislature of the State if the jurisdiction of the United States is not to be exclusive and that of the State excluded?

"The question is not an open one. It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the State passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction."

Appellant contends that if Arkansas is unable under the ruling of this court, in the *Surplus Trading Company* case, to tax tangibles, even though privately owned, at a military reservation, authority over which has been ceded by the state, California cannot levy an excise or license or privilege tax upon a transaction which admittedly took place entirely within the Presidio and similarly outside of state jurisdiction, because of unqualified cession.

This court early established in *State Tax on Foreign Held Bonds*, 82 U. S. 300; 319, that subjects of taxation, whatever their character, must be within the jurisdiction

of the taxing state and that this rule applies to all subjects of taxation alike, whether they be persons, property or business. This court said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and *business*. Whatever form taxation may assume, whether as duties, imposts, *excises*, or *licenses*, it must relate to one of these subjects."

The event, and the sole event, which calls the California gasoline tax act into operation is a sale within the state. The act refers only to sale within the state as the taxable incident, and the California Supreme Court has not suggested any other construction. On the contrary, that court itself defines the question presented here, as "whether sales . . . at a military reservation under the sole jurisdiction of the United States are to be excluded in fixing the license fees".

Furthermore, whether the California gasoline tax be described as a sales tax or business tax or distributors' tax, the sale was made, the business done, and the distribution accomplished entirely within the Presidio and the state has no power to impose a license or excise tax there.

If the decision of the State Supreme Court were to stand it would be consistent for the assessor in San Francisco to seek to include on his rolls the tangible personalty of the officers and enlisted men at the Presidio.

Reference may also be made to the decision of this court in *United States v. Unzeuta*, 281 U. S. 138. This

case involved the question whether a crime committed on a military reservation belonging to the United States which had been ceded to it by the State of Nebraska was punishable by the United States because it had acquired exclusive jurisdiction over the property. This court held that the situation was governed by the terms of the cession, and since no express reservation had been made by the state it was totally without jurisdiction and federal authority was established. This court said (p. 142):

> "The terms of the cession, to the extent that they may lawfully be prescribed, determine the extent of the federal jurisdiction.
>
> "In the present instance, there is no question of the status of the Fort Robinson Military Reservation. Nebraska ceded to the United States its entire jurisdiction over the reservation save in the matter of executing process and opening and repairing roads or highways. It was in this view that the Federal Circuit Court decided that, after this jurisdiction had been accepted by the United States, it could not be recaptured by the action of the state alone, and hence that an act of the legislature of Nebraska, passed in 1889, seeking to amend the act of cession was not effective, and that the statutes of the state regulating the sale of liquors were not in force within the ceded territory. *In re Ladd*, 74 Fed. 31. The conditions of the cession relating to the execution of criminal process were construed as intended to save the right to execute process within the reservation for crimes committed outside, that is, to prevent the reservation from being a sanctuary for fugitive offenders."

In *Concessions Co. v. Morris*, 109 Wash. 46, 186 Pac. 655, the Supreme Court of Washington held that personal property belonging to the plaintiff and situate on Camp Lewis military reservation was outside of the state and therefore not subject to personal property taxation levied under the laws of the state. The court said:

> "Under our law, Rem. & Bal. Code, section 9101, only personal property in the state of Washington can be listed for taxation, and the question, therefore, must be answered by a determination of whether personal property situated upon this military reservation is in the state of Washington. It seems to us that the answer to this is clear, and that such property is without the state in both a jurisdictional and territorial sense, for, as we have seen by the Constitution of the United States, and the act of the Legislature of this state, both the military reservation itself and the jurisdiction and legislation over it have been granted to the United States, and thereby there has been created an independent sovereignty the territory of which is surrounded by the state of Washington, but over which the state of Washington has no jurisdiction. A territory has been created which resembles that of the District of Columbia, the only reservation being that the state of Washington can serve civil and criminal process therein on actions arising outside the reservation."

In *Yellowstone Park Transportation Co. v. Gallatin Co. et al.*, 31 F. (2d) 644 (certiorari denied, 280 U. S. 555), the Circuit Court of Appeals for the Ninth Circuit held that after the state's cession to the United States of exclusive jurisdiction over Yellowstone National Park, reserving only the right to serve and execute process, the state taxing laws became wholly inoperative over the

Park and personal property located there was not subject to the state tax. The court referred to the case presented in *Arlington Hotel Co. v. Faut*, 278 U. S. 439 (where the right to tax was reserved), as follows:

> "In 1903 the Legislature of the state of Arkansas (Acts 1903, p. 52) ceded to the United States exclusive jurisdiction over certain territory surrounding the Hot Springs in that state, reserving only the right to execute civil and criminal process and the right to tax, and in Arlington Hotel Co. v. Faut, 176 Ark. 613, 4 S. W. (2d), 7, it was held that a statute enacted by the state Legislature after the date of cession, restricting the liability of innkeepers, was inoperative within the ceded territory."

and concluded that

> "after the date of cession, the ceded territory was as much without the jurisdiction of the state making the cession as was any other foreign territory, except in so far as jurisdiction was expressly reserved. For this reason, the taxing laws of the state of Montana are wholly inoperative in that portion of the Yellowstone National Park within the territorial limits of the state."

The precise question presented in this case has been decided in favor of our contention by the United States District Court for the District of Maryland in *United States v. Cordy*, 38 F. (2d) 1013.

The Maryland gasoline tax act imposes the tax upon the dealer in motor vehicle fuel and defines him to be "any person . . . who imports . . . gasoline . . . for use, distribution or sale and delivery *in*, and after the same reaches *the State* of Maryland." The same definition is made applicable to any person producing, refin-

ing, manufacturing or compounding motor vehicle fuel *in the state* for use, distribution or sale and delivery *therein.* The California act, as we have seen, requires the payment of the tax "for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor *in this state* and sold and delivered by him *in this state* or imported . . . and distributed or sold . . . in *this state* otherwise than in the original package."

The Maryland act provides that the tax "shall not be imposed on motor vehicle fuel when exported or sold for exportation from the State of Maryland to any other state or nation." The California act, Section 10, exempts from tax "any motor vehicle fuel exported or sold for exportation and exported for use outside this state."

The similarity of the provisions of the two acts is immediately apparent. In *United States v. Cordy*, the Maryland taxing authorities attempted to impose the gasoline tax upon deliveries made from the State of Maryland to the Post Exchange at Fort Meade, a military reservation of the United States Government. The United States District Court for the District of Maryland construed the act as taxing only sales and deliveries in the State of Maryland, and held that since Fort Meade is exclusively federal territory, sales to the Post Exchange situated in it are free from tax.

In referring to the federal ruling in Maryland, the California Supreme Court (R. p. 70) stated that the decision was based "upon the peculiar provisions of the act there involved". A comparison of the quoted provisions of the Maryland and California acts shows that they are practically identical in jurisdictional and geographical scope

and text, and that in each case the operation of the statute is confined to transactions within the state. There is no language in the Maryland act differing from the California law which places military reservations in a class apart or excludes sales made there. The California decision, therefore, cannot be based on any difference in the terms of the two statutes.

In concluding this point, we submit that the position taken by the trial court in this case is sound (R. p. 65):

> "I am satisfied that after exclusive jurisdiction is ceded a military reservation remains within the State from which it was carved only in a broad, general and geographical sense; that it becomes United States territory and that in no *legal* sense does it remain within the State; that it certainly is not within the State's taxing jurisdiction any more than it is within the State's criminal jurisdiction."

On this question of paramount importance, the California Supreme Court in this case has not said a word.

II.

IF THE SALE HERE UNDER REVIEW BE REGARDED AS ONE INITIATED IN TERRITORY UNDER CALIFORNIA JURISDICTION AND CONCLUDED IN TERRITORY UNDER FEDERAL JURISDICTION IT CONSTITUTES COMMERCE WITHIN THE EXCLUSIVE JURISDICTION OF THE UNITED STATES.

In one sense, this point may be regarded as a corollary of the proposition that the federal government alone has jurisdiction over the Presidio. It is, however, a point of independent force, in placing the invalidity of the tax upon

two alleged grounds: (1) the tax violates the commerce clause of the federal constitution, and (2) if it be argued that commerce between San Francisco and the Presidio is not interstate, the answer is that in any event a state has no power to regulate or burden commerce passing beyond its borders.

(a) Decisions sustaining a tax upon the withdrawal, storage or use of gasoline within a state have no application here.

It has been made to appear that the California gasoline tax act levies the tax only with reference to a sale. In point of fact, the tax is imposed only when sales are made for vehicular use on highways. Gasoline for all other uses is exempt and there is no tax on withdrawal or storage. The statutes of other states which have recently been reviewed by this court, and in which sale was not the sole privilege taxed, but withdrawal, storage or usage were also included in the text of the act, have therefore no application here.

In *Edelman v. Boeing Air Transport, Inc.*, 289 U. S. 249, decided last April, this court had before it the Wyoming gasoline tax act which imposes the tax upon all gasoline sold *or used* in the state. This court held that the tax applied to stored gasoline as it was withdrawn from the storage tanks, and that at the time of withdrawal "use" was measured for the purposes of the tax. Stored gasoline was deemed to be "used" within the state and, therefore, subject to the tax, when withdrawn from the tanks. In this way, gasoline subsequently devoted to interstate commerce purposes was held to come properly within the scope of the Wyoming act.

In *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249, the Tennessee gasoline tax act was up for

review. Under specific provisions of the act, the tax applied to persons storing gasoline and distributing it or allowing it to be withdrawn from storage, whether such withdrawal was for sale or other use. In the language of this court (p. 265):

> "Storage of the gasoline and withdrawal of it from storage within the state for use or sale are, as the State Supreme Court has held, the events which, by the very terms of the statute, call it into operation."

Compare the California statute and situation. Sale within the state is alone the taxable event. Use for purposes other than vehicular traffic on highways is exempt under Section 11 of the act, and purchasers for such other purposes are entitled to refund (Appendix p. iii).

In *Hart Refineries v. Harmon*, 278 U. S. 499, this court considered the Montana statute, which, like the California act, taxes sales but not use. This court held that although a state may tax the use as well as the sale of gasoline, a state law taxing sales alone is not invalid and discriminatory because it lays no tax on use. The distinction for which we are here contending is well exemplified in this case.

In *Bowman v. Continental Oil Co.*, 256 U. S. 642, this court sustained the New Mexico tax upon the use, as well as sale, of gasoline, and held that a local excise tax as applied to local sale and use of gasoline by a distributor who has imported his product does not violate the commerce clause. Here again use or sale within the state are made to support the tax.

At the risk of repetition we reassert that the elements present in these cases are excluded in the case of the

California statute. Not only is sale within the state made the only basis with reference to which the tax can be levied, but use, as such, is expressly made nontaxable by the refund provisions, and withdrawal and storage are not mentioned. The legislative intent in this regard may be readily understood in a state in which gasoline manufacture and consumption for highway purposes are substantial.

(b) Decisions sustaining a tax upon property situated or sales made within a state have no application here.

Our situation is not to be confused with that presented in the line of cases exemplified by *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U. S. 147. The *Eastern Air Transport* case involved the South Carolina gasoline tax on sales made within the state to airplanes engaged in interstate commerce. This court found no difficulty in holding that whether the gasoline tax was an excise tax imposed on the sale or a property tax levied on the gasoline itself, the levy was valid because the sale took place within the state and the property was in the state at the time of sale. The essential ground upon which the opinion rests is shown in the following extracts from it (p. 152):

> "The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the state to be an excise tax and not a property tax . . . So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales *within the state* were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within

> the state and hence subject to the state's authority to tax, although the property might actually be used in interstate commerce . . . Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions . . .
>
> "Undoubtedly, purchases of goods within a state may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the state upon intrastate dealers . . .
>
> "There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier."

Contrast the situation in the present case. The sale here involved was not made within the state and the property was not in the state when the sale was consummated. The carriage of the gasoline originated in San Francisco, but the sale did not take place until delivery was made at the Presidio. If the gasoline had been sold in San Francisco to motor carriers engaged in making deliveries of merchandise in the Presidio, or to airplane carriers making flights over the Presidio, this case would come within the ruling in the *Eastern Air Transport* decision and the tax would be payable. But this is not what has occurred. The seller itself, and not the buyer, transported the gasoline into the Presidio in the first instance and there the sale was made.

The point may here be noted, to anticipate respondent, that the *Eastern Air Transport* case is authority against one of the points earnestly argued by the state. The Attorney General of California has contended that since some of the gasoline sold in the Presidio later finds its way in motor vehicles to the highways of the state, it is proper that the state tax should be levied. In the *Eastern Air Transport* decision, however, this court points out clearly that the use to which a commodity is put after sale has no bearing whatever on the tax.

Stoutenburgh v. Minnesota, 283 U. S. 57, relied upon by the Attorney General below, may be placed in the same category as the decision in the *Eastern Air Transport* case. It upholds a Minnesota statute requiring registration of motor vehicles in order that they may be privileged to use the public streets and highways in the state. The case comes clearly within the principles announced in the *Eastern Air Transport* case that when property is situated or a privilege is exercised within a state, it comes properly within the taxing power of the state. If California wished to register and license motor vehicles coming from the Presidio and using the highways or to tax any motor car after coming within the borders of the state for the privilege of using the highways there would be no constitutional obstacle in the way. The California legislature has not, however, imposed such a tax.

Reference may be made to a third case heretofore cited by the Attorney General, *Interstate Transit Co. v. Lindsey*, 283 U. S. 183. In this case the Tennessee tax on interstate motor buses, graduated according to carrying capacity, was held to be a privilege tax on the carrying on of interstate business and repugnant to the commerce

clause. This court pointed out that if the tax were a mileage tax or if the levy bore some reasonable relation to the privilege of using the highways it would have been upheld. Neither of these conditions is met in this case. On the contrary, if the full amount of the California tax were applied to gasoline passing beyond the borders of the state it would come within the prohibition enforced in the *Interstate Transit Co.* case. The levy would be invalid for the further reason that it would be measured by gross sales, a method condemned by this court in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292.

(c) The California law exempts "any motor vehicle fuel exported outside this state".

Section 10 of the California gasoline tax act (Appendix, p. iii), recognizing the inability of the state to tax shipments for sale or delivery outside of state jurisdiction, expressly exempts "any motor vehicle fuel exported or sold for exportation and exported for use outside this state." The situation is precisely the same as it would be if the gasoline had been shipped for delivery in Nevada instead of in the Presidio. Indeed, it is stronger because in the case of the sale here involved it is stipulated that delivery was made in appellant's tank-trucks, the expense and risk of loss in making delivery were borne by appellant and the place of sale was the Presidio. In export sales the seller not infrequently appropriates specific gasoline to the contract of sale and title passes at the point of origin. Such sales are none the less exempt from tax. For a stronger reason the exemption must apply when the gasoline moves beyond state jurisdiction before the sale is made.

The Attorney General suggested in the California Supreme Court that the allegations of the answer are insufficient to support our contention that the exemption of motor vehicle fuel exported from the state applies in this case. The answer alleges that "defendant did sell and deliver 120 gallons . . . of motor vehicle fuel . . . to the Presidio Post Exchange at San Francisco." The agreed statement records fully the attendant facts. The case was tried and argued in the trial court on the theory that the effect of transportation from San Francisco to the Presidio was one of the major issues in the case. Even though the pleadings were insufficient, which is not the case, the theory upon which the trial proceeded and the written statement of facts made by the parties would waive the necessity of amendment. *County of Butte v. Merrill*, 141 Cal. 396.

(d) The status of the Presidio is similar to that of the District of Columbia; and a state cannot burden or regulate commerce passing between it and the District.

We have seen that the Presidio is "an independent sovereignty . . . which resembles . . . the District of Columbia" (*Concessions Co. v. Morris*, p. 17, *supra*). This court has ruled that an attempted tax upon commerce between the District and the states of the Union is invalid.

Stoutenburgh v. Hennick, 129 U. S. 141, involved an act of the Legislative Assembly of the District of Columbia relating to license taxes on persons engaged in trade or business within the District. This court held that the provision in the act which sought to require commercial agents offering goods for sale by sample to take out a license was invalid as a regulation of interstate commerce

when applied to solicitors acting for firms doing business outside the District. In *Robbins v. Shelby Taxing District*, 120 U. S. 489, this court had held invalid a tax upon drummers acting in one state for a principal situate in another state. The reasoning followed and the canons announced in that case were applied in the *Stoutenburgh* case to commerce between a state and the District of Columbia. This court said:

> "The power granted to Congress to regulate commerce is necessarily exclusive whenever the subjects of it are national or admit only of one uniform system or plan of regulation throughout the country, and in such case the failure of Congress to make express regulations is equivalent to indicating its will that the subject shall be left free; that in the matter of interstate commerce the United States are but one country and are and must be subject to one system of regulations, and not to a multitude of systems; and that a state statute requiring persons soliciting the sale of goods on behalf of individuals or firms doing business in another state to pay license fees for permission to do so, is, in the absence of congressional action, a regulation of commerce in violation of the Constitution. The business referred to is thus definitively assigned to that class of subjects which calls for uniform rules and national legislation, and is excluded from that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively . . . . It falls, therefore, within the domain of the great, distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality."

In *Washington Electric R. Co. v. Waller*, 280 Fed. 508, it was held that a passenger on an electric railway car, who had a ticket from Annapolis to Washington, was an interstate passenger and that a Maryland statute requiring segregation of white and colored passengers could not be enforced against him. See also *Hart v. State*, 100 Md. 595, to similar effect.

(c) The commerce clause is not confined to commerce between states.

Hanley v. Kansas City Southern Railway Co., 187 U. S. 617, applies the rule against burdens on interstate commerce to shipments passing from a state through a territory. Citing the *Stoutenburgh* case this court said:

> "It may be assumed that this power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the states."

It is established, therefore, that the commerce clause of the federal constitution is not confined to commerce between states. It has been construed to include transportation from a state to the District of Columbia and from a state to a territory. With equal force it is applicable to a shipment from San Francisco to the Presidio. Whether we call such commerce interstate or describe it simply as commerce passing beyond the borders of the state, the distinction is unimportant. In either case the state has no power to regulate or burden it and Congress has exclusive jurisdiction over it.

III.

THE CALIFORNIA GASOLINE TAX DOES NOT APPLY TO MOTOR VEHICLE FUEL SOLD TO THE GOVERNMENT OF THE UNITED STATES OR ANY DEPARTMENT THEREOF FOR THE OFFICIAL USE OF THE GOVERNMENT. THE PRESIDIO POST EXCHANGE IS A DEPARTMENT OF THE UNITED STATES ARMY, PERFORMING AN OFFICIAL FUNCTION OF THE FEDERAL GOVERNMENT.

The California gasoline tax act* provides, Section 10, that the act shall not apply "to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government." The Presidio Post Exchange is organized under and does business pursuant to and in accordance with War Department regulations (R. p. 5). The promulgation of such regulations is authorized by statute (16 Stat. 319, 18 Stat. 337). In addition, promulgation of rules to govern the Army is within the constitutional powers of the President as Commander in Chief, and the rules when sanctioned by the President have the force of law. This sanction may be either express or implied. Legislative ratification is also implied when Congress permits regulations to be promulgated and carried into effect from year to year. These regulations have the force of law.**

*Cal. Stats. 1923, p. 571, as amended by
Cal. Stats. 1925, p. 639; Stat. 1927, p. 1308; and
Cal. Stats. 1929, Ch. 48, p. 112, Ch. 552, p. 935, and
Ch. 779, p. 1531 (Two Cent Tax Act).
See also:
Cal. Stats. 1927, p. 1565, as amended by Cal. Stats. 1929,
Ch. 208, p. 367 (One Cent Tax Act).

**See:
Henry Woog, Administrator v. U. S., 48 Ct. Cl. 80, 88-9;
Dugan v. U. S., 34 Ct. Cl. 458, 4 Am. Fed. Tax Repts. 4922, 4925;
Kurtz v. Moffett, 115 U. S. 487, 503;
United States v. Freeman, 3 How. 556, 567;
Smith v. Whitney, 116 U. S. 167, 181;
Willoughby on the Constitution of the United States, p. 1566;
United States v. Eliason, 16 Pet. 291, 301;
Gratiot v. U. S., 4 How. 80, 117-18;
Maddux v. U. S., 20 Ct. Cl. 193, 198;
Ex Parte Reed, 100 U. S. 13, 22;
Federal Constitution, Art. 2, Sec. 2 and Art. 1, Sec. 8, Clauses 12, 13, and 14.

(a) Summary of War Department regulations governing post exchanges.

Congress has recognized post exchanges since 1903 by providing periodic appropriations for the construction, equipment and maintenance of post exchange buildings.* The primary purposes of exchanges are defined in the Regulations (R. p. 9):

> "(1) To supply troops, at the lowest possible prices, with articles of ordinary use, wear and consumption not supplied by the Government.
>
> "(2) To afford to troops means of rational recreation and amusement.
>
> "(3) Through exchange profits to provide, when necessary, the means for improving the company messes."

An exchange is authorized to maintain a gasoline filling station (Army Regulations, 210-65, par. 5, a, subd. 1; R. p. 9). Sales to civilians were at first permitted to civilian employees of the post, but by amendment to the regulations contained in War Department Circular 57, dated October 31, 1929, the only civilian employees who may purchase are members of a foreign expeditionary force and those employed with the Army and quartered at stations so located as to make the purchases from civilian agencies impracticable.

The members or stockholders of a post exchange are the companies or similar units stationed at the post (A. R. 210-65, par. 8, a; R. p. 10). Under a ruling of the Acting Secretary of War, dated April 20, 1906, membership in

*32 Stat. 937, 938; 33 Stat. 270; 33 Stat. 836; 34 Stat. 253, 1169; 35 Stat. 149, 516, 744; 36 Stat. 255, 1050; 37 Stat. 582, 619, 715; 38 Stat. 364, 1076; 39 Stat. 636; 40 Stat. 56, 195, 363, 479, 830, 862, 1029; 41 Stat. 118, 963, 1184; 42 Stat. 83, 719, 1056, 1167, 1380; 43 Stat. 480, 711, 895; 44 Stat. 190, 256, 1108; 45 Stat. 49, 329, 1352.

the post exchange is not obligatory on the military units of the garrison (par. 8, b; R. p. 11, and par. 81, b; R. p. 50) but in actual practice, all such units, except possibly small detachments, become members of post exchanges. Application for membership by companies or similar units is made by the commanding officer (par. 9; R. p. 13). The business of the exchange is conducted by an exchange officer detailed for that purpose (par. 17; R. p. 17) under the supervision of the post exchange council (par. 16, c; R. p. 15) and subject to the control of the commanding officer of the post (par. 2; R. p. 8). The post exchange council consists of the commanding officers of the participating units. The method of management, keeping of records, auditing of accounts, and other operating directions, are prescribed by Army Regulations. The commanding officer, post exchange officer, and members of the post exchange council perform their duties not as volunteers, but as part of their official duties.

The profits of the post exchanges are distributed (par. 8, d; R. p. 11) in proportions fixed by regulations, for supplementing governmental allowances for military bands, for the post recreation fund, the cultivation of gardens, purchase of books for the post library, the purchase of gymnastic appliances and prizes for athletic sports, for the chaplain's fund and for the benefit of the organization funds of the separate units composing the membership of the post exchange. The various funds to which these profits are distributed are in turn expended for the purposes prescribed by Army Regulations 210-50. Each of these funds serves a governmental purpose, including the improvement of messes, contribution to the contentment and mental and physical improvement of troops, the benefit

of the sick in hospital, welfare work, aiding the activities of bands, and for moral, religious and educational purposes. No part of the profits is distributed to any individual for personal or private use.

In this application of the proceeds of post exchange earnings lies full justification for holding that exchanges are federal instrumentalities. They provide the funds for garrison purposes which Congress itself would otherwise have to supply in decent regard for the welfare of military personnel and the proper equipment of military posts.

The fact is stipulated that the Presidio Post Exchange is operated under and in conformity with the regulations, the pertinent parts of which have been summarized (R. p. 5). The exchange is a creature of Congress, operated as a part of the United States Army under the regulation of the Secretary of War, promulgated on behalf of the President as Commander in Chief of the Army. It is, therefore, as much a department of the United States Army as the commissary department of the Quartermaster Corps. Its uses are official, its operations are precisely restricted, and its sales can be made only to members of the Army, except in remote outposts where civilian employees engaged in army work have no other source of supply.

(b) History and development of post exchanges.

A brief history of the development of the post exchange shows how it obtained its present character as an instrumentality of the federal government. The first enactment designed to provide troops with supplies for their well-being and comfort, but of such nature that they could not be conveniently furnished as a part of the Army ration, established the office of sutler (Sec. VIII, Art. 3, Articles

of War, September 20, 1776). The sutlers supplied troops with required merchandise and other articles, including beer and wines, under War Department regulations. The office of sutler was abolished July 28, 1866 (14 Stat. 336), and the subsistence department of the Army was required to furnish supplies designated by the Inspectors General of the Army, to be sold to the officers and enlisted men at cost price to be deducted from pay (14 Stat. 336, sec. 25). Thereafter post traders were licensed to operate on military reservations, and canteens or social clubs were organized by military personnel from private funds. Finally, post exchanges were organized under General Orders No. 10, Adjutant General's Office, February 1, 1889. By the Act of January 28, 1893 (27 Stat. 426), and under new regulations promulgated in 1895 (General Orders 46, Hdqrs. of the Army, July 25, 1895), the present post exchanges were established, superseding both post traders and canteens.

Appellant has not discovered any ruling or statement by this court defining the nature of an army post exchange. The question has, however, been considered on occasion by the lower courts and is the subject of numerous decisions of the War Department, the Judge Advocate General and the Navy Department. These decisions and rulings are assembled and analyzed in the Appendix at pages iv to xviii.

(c) States cannot tax sales to federal agencies.

Before the decision of this court in *Panhandle Oil Company v. Mississippi*, 277 U. S. 218, the War Department had conceded in a few instances that certain kinds of taxes were payable by post exchanges. These rulings are not, however, to be construed in any sense as a recession from

the position consistently maintained that the exchanges are official branches of the government. The taxes involved were held payable solely because they were deemed to be levied either upon the goods themselves or upon the business of selling, including sales to the government. See, for example, Ops. J. A. G. 012, 412, September 25, 1923, holding certain articles imported through post exchanges subject to duty, since the "tariff act did not exempt from tariff duty supplies imported for the use of the Government"; Ops. J. A. G., February 28, 1919 (mentioned in A. R. 210 65, par. 77, c), holding that the federal floor tax on tobacco was payable by post exchanges because *it was a tax on the articles sold to the government*; and Ops. J. A. G., Dig. 1922, p. 45, holding the government liable for the Kentucky gasoline tax on the theory that the levy was a tax imposed upon the business of selling gasoline to the government.

This latter ruling was reversed when this court held in the *Panhandle Oil Company* case, *supra*, that the Mississippi gasoline tax, even though levied on the business of selling, could not be applied to sales to an instrumentality of the United States. The Mississippi act provided that the tax be paid by the distributor for the privilege of distributing gasoline in the state. The State Court upheld the tax on sales to the United States Veterans' Hospital and to the United States Coast Guard, and construed the levy as a privilege tax on the dealer for the right to carry on the business, the measure of the tax being the gallonage sold. Since the tax was construed as a privilege tax instead of a direct tax, the court thought that it was not a charge upon any federal agency. This court held otherwise and said (p. 221):

> "While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes. . . .
>
> "Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers."

In *Graubarg Oil Co. v. State*, 286 S. W. 489, 3 S. W. (2nd) 127, the Court of Civil Appeals and Commission of Appeals of Texas held the Texas gasoline tax applicable to sales to the United States government at a military reservation. The act provided that "every person selling at wholesale in intrastate commerce in this state any gasoline shall pay to the State of Texas an occupation tax equal to one cent per gallon of all such gasoline so sold by such person." There was no express exemption of government agencies, as in the California statute, but this court nevertheless reversed the decision of the Texas courts (278 U. S. 582) on the authority of the *Panhandle Oil Company* case.

(d) The California gasoline tax comes directly within the prohibition enforced by this court in the Panhandle Oil Company case.

The nature of the California gasoline tax has been defined by the Supreme Court of California in *People v. Ventura Refining Co.*, 204 Cal. 286, 294:

> "The clear intent of the law was to levy an excise or occupation tax upon distributors of motor vehicle fuel, *giving such distributors, however, ample opportunity to fully indemnify themselves by adding the amount of the tax to the selling price of the fuel* and thus in effect collect the tax from the consumer."

The ruling in *Old Homestead Bakery, Inc., v. W. H. Marsh*, 75 Cal. App. 247, 256 6, is similar:

> "It is true that the license tax of two cents per gallon on all fuel gas sold and distributed by those engaged in the business of selling the same for motor vehicle purposes is not a direct license tax upon those owning or using such vehicles, yet, that the act operates indirectly to impose upon the owners or operators of such vehicles a tax of two cents on every gallon of gas that they purchase for use in propelling motor vehicles, is, from the very nature and logic of the situation, indisputably true. This proposition irresistibly follows from the fact that taxes assessed against the goods and wares of the vendor thereof and by him paid are always included in so called 'overhead expenses,' and, of course, *constitute an element in the fixing of the market value of the goods, or, at all events, is an element of the cost of the goods to the consumer.*"

These decisions bring the California gasoline tax, as applied to purchases for the use of the federal government, clearly within the prohibition of the *Panhandle* and *Graybar* cases.

It will be noted that section 10 of the California statute excluding from taxation sales "to the United States of America or any department thereof" was amended (Cal. Stats. 1927, p. 1308) by adding the words "for the official use of said government." This provision imposes no new

limitation for all sales to the United States or a department thereof are necessarily for the official use of the government.

It is not inappropriate in concluding this portion of our argument to quote from a War Department Memorandum which well describes the official character of the post exchange as a federal agency:

> "Though education, of at least a primary and common school variety, is recognized throughout America as a cardinal obligation of governments, the Congress has made no provision for supplying such needs of the children of its military personnel stationed on reservations over which exclusive jurisdiction has been ceded the United States; notwithstanding, that, while so inhabiting such reservations the educational advantages of schools, accorded by states to their inhabitants, are not to be enjoyed by such military personnel, except as a matter of grace and indulgence on the part of the states, even though the military reservation is entirely surrounded by the state within the geographic limits of which it is situated (6 Op. Atty. Gen. 577). Except the post exchange profits as are allotted for supplying education to the children of such military personnel, no quasi-public nor public funds are devoted to discharging this governmental obligation there to do.
>
> "To supply this deficiency, among other things, and to discharge governmental obligations in the lawful exercise of constitutional powers, the post exchange system has been inaugurated, established and is being maintained with Congressional sanction—even dependence, since profits from post exchanges are utilized 'for the purpose of assisting in the payment of the tuition of the children of enlisted men only, to such extent as may be authorized by commanding officers; or for the establishment of schools

for such children on military reservations, or to otherwise assist in their education.'

"Only slightly less obligatory in character is the governmental propriety and desirability of fostering the moral and religious lives of its military personnel. The Congress having made no appropriation, aside from the pay and allowances of chaplains, for the laudable, if not indispensable, propagation of the benefits of the Christian religion among its regular soldiery, such is prescribed as one of the objects to which post exchange profits may be devoted. Thus is afforded the only funds either quasi-public or public which may lawfully be expended for the dissemination of religious teachings and moral training on military reservations.

"Aside from the support furnished education and religio-moral undertakings, profits from post exchanges are devoted to providing, or supplementing provisions made by the Congress, for those things which the President, the Commander-in-Chief of the Army, acting through the Secretary of War, considers desirable, perhaps even necessary, to the proper maintenance of the nation's military establishment.

"The testimony of the then Secretary of War before the House Military Affairs Committee of the 69th Congress at its 2d Session, Jan. 10, 1927, relative to the Army ration, reveals sharply the governmental functions served by post exchanges, in aid of which a portion of its profits are expended. He states, *inter alia*:

"That the ration 'is too small, I think, as shown by the fact that in practically every case I know of where any funds are available, company funds or *post exchange funds*, or anything of that sort, they are actually being used and have been used for years

> in supplementing the ration . . . *the profits of these post exchanges* and similar funds are really taken from the men themselves and if those profits are put back into 'the feeding of the men, they are actually paying a certain part of their own food cost' (p. 712, Vol. 2, 69th Cong. Hearings House and Senate). See also to the same effect the testimony of the Quartermaster General at that hearing. Id. p. 740" (Memorandum of Lester S. Hill, Jr. Major J. A. G. D. Ch. Civ. Affairs, Section No. 1—J. A. G. 463.7, Sept. 21, 1929).

For the reasons given we respectfully urge that the post exchange is as much a part of the war department as the commissary or the quartermaster corps. It is thus a department of the federal government, its purposes are official and the California gasoline tax cannot be applied to sales made to it. The California statute expressly exempts such sales and the exemption is required by the federal constitution.

IV.

CONCLUSION.

It is respectfully submitted that the decision of the Supreme Court of California should be reversed and that of the trial court affirmed.

Dated, San Francisco,
December 11, 1933.

OSCAR SUTRO,
FELIX T. SMITH,
VINCENT K. BUTLER, JR.,
Attorneys for Appellant.

Appendix

I.

PERTINENT SECTIONS OF THE CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX ACT.

Section 1. The following words, terms and phrases shall whenever used in this act, have the meaning set forth in this section.

(a) "Motor vehicle" shall include every vehicle operated upon the highways of this state which is propelled by the use of motor vehicle fuel.

(b) "Motor vehicle fuel" shall include all gasoline, distillate, benzine, naptha, liberty fuel and other volatile and inflammable liquids produced or compounded for the purpose of, or which may be used in, operating or propelling motor vehicles, except kerosene and except unfinished products requiring rerun, blending, or compounding and which are not used or sold for use in such form for the purpose of operating or propelling motor vehicles.

(c) "Distributor" shall mean and include every person, firm, association or corporation who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state; also every person, firm, association or corporation who imports any motor vehicle fuel into this state and sells the same in this state whether in the original packages or containers in which it is imported or otherwise than in such original packages or containers; or imports any such fuel for his own use in this state; also every person, firm, association or corporation who, having acquired in this state in the original package or container motor vehicle fuel which has

been imported into this state, shall distribute or sell the same, whether in such original package or container in which the same was imported or otherwise than in such original package or container.

(d) "Service station" is a place operated primarily for the purpose of delivering motor vehicle fuel into the fuel tanks of motor vehicles (Cal. Stats. 1923, chap. 267, p. 571).

Sec. 3. Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter distributed or used by such distributor or sold by him otherwise than in the original package or container in which the same was imported into this state and for each gallon of motor vehicle fuel sold, distributed or used by him from any stock on hand or held in storage by him on September 30, 1923. From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling (Cal. Stat. 1923, chap. 267, p. 572).

Sec. 10. The provisions of this act requiring the payment of license fees shall not be held or construed to apply to motor vehicle fuel imported into this state in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce nor to any motor vehicle fuel exported or sold for exportation and exported for use outside this state, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government but every distributor shall be required to report such exports and sales to the state board of equalization in such detail as that board may require (Cal. Stats. 1923, p. 572, as amended by Cal. Stats. 1925, p. 660 and Cal. Stats. 1927, p. 1309).

Sec. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated, or intended to be operated upon the public highways of the State of California or export the same for use outside of this state; also any person, firm, association or corporation who shall buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mails, and who shall have paid any license tax for such motor vehicle fuel hereby required to be paid, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such tax to the price of such fuel, shall be reimbursed and repaid the amount of such tax paid by him or it upon presenting to the state controller an affidavit accompanied by the original invoices showing such purchase, which affidavit shall be verified by

the oath of the claimant and shall state the total amount of such fuel so purchased and the same has been used by said consumer for the transportation of rural free delivery mails or for uses other than in motor vehicles operated upon any of the public highways in the State of California. The said state controller, upon the presentation of such affidavits and such invoices or vouchers, shall cause to be paid to such consumer, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on the motor vehicle fuel so purchased or so used. All such applications shall be filed with the state controller within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after such twelve months shall not be considered for any purpose by the state controller, the treasurer or the State of California (Cal. Stats. 1923, chap. 267, p. 575, as amended by Cal. Stats. 1925, p. 660 and Cal. Stats. 1927, p. 1309).

II.

DECISIONS AND RULINGS ON THE POST EXCHANGE AS A FEDERAL AGENCY.

(a) In three cases it has been held that the post exchange is a federal agency.

In *Dugan v. United States*, 34 Ct. Cl. 458, it was held that a post exchange is a governmental agency under the complete control of the Secretary of War, and that the special tax imposed upon retail liquor dealers was not required to be paid by post exchanges. The court recog-

nized that post exchanges are an integral part of Army organization and an essential factor in military life; that they are not volunteer organizations of individuals, but institutions which fulfill a specific purpose in the military scheme which works for the efficiency of the Army; that building funds for post exchange quarters have been supplied by Congressional appropriation; and that any profits derived from exchange operations are applied to meet needs which Congress, in promoting the welfare of the military personnel, might otherwise be called upon to supply.

The court said:

> "Under Post Exchange Regulations, adopted by the War Department and published by General Orders, No. 46, Headquarters of the Army, July 25, 1895, post exchanges were established and the commanders at every post thereby required to institute the same. . . .
>
> "If, therefore, in the judgment and wisdom of the Executive the establishment of such post exchanges and their management by the officers of the army are essential to the welfare, good order, and discipline of the troops stationed at such army posts, as seems evident from the exchange regulations thus promulgated, then we think such exchanges, though conducted without financial liability to the government, are, in their creation and management, governmental agencies, established for the purpose, as the regulations provide, of supplying 'the troops at reasonable prices with the articles of ordinary use, wear, and consumption not supplied by the government, and to afford them means of rational recreation and amusement', and also, 'through exchange profits, to provide the means for improving the messes.'

> "In other words, the President, looking to the welfare and discipline of the troops, sees that they need some things for ordinary use, wear, and consumption, not supplied by the government, and to meet that condition the War Department adopts and promulgates the regulations whereby post exchanges are established as the medium through which such lack may be supplied."

The Court of Claims similarly held a post exchange a federal agency in *Hyra v. Wood, Administrator*, 71 F. 2d, 19 Ct. Cl. 80, a case involving the loss of post exchange funds:

> "The record presents a troublesome and exceedingly important question to the Military and Naval Establishments of the United States. The contention of the plaintiff is that the amount lost did not belong to the United States, but to the enlisted men, and that even if the funds were lost through the negligence or fault of the officer in charge there is no liability on the part of the officer because the funds did not cover property of the Government . . .
>
> "From what has been said it will be seen that the post exchange is not a voluntary association, but an institution established by the Government for the convenience of the officers and more particularly for the discipline of the enlisted men. The consent of the officers and men for the establishment and maintenance of an exchange is by no means necessary. The regulations settle that. As shown in Dugan's case, supra, the Government acts through its officers under authority of the regulations, and the officer put in charge receives and disburses all the funds, and whatever profit that may accrue is paid to and held by the officer in command of such organization as a company fund. Regulations of the Navy Department, sections 1035 and 1040, inclusive, provide for the

establishment of post exchanges. These regulations conflict with no law.

"A conspiracy to defraud the United States under section 5440 of the Revised Statutes does not necessarily involve a direct pecuniary loss to the United States. But the statute includes any conspiracy to impair, obstruct, or defeat *the lawful function of any department of the Government*.

"Inasmuch as the findings show that the officer was at fault, and did not properly account for the funds which came to his hands, relief under the statute must be denied."

The Supreme Court of the Philippine Islands, in banc, in the case of *Post Exchange, 31st Infantry v. Graves & Kenney* (R. G. No. 30,959, decided August 28, 1929),* held the post exchange to be a federal instrumentality. The exchange had not been registered under the commercial statutes of the Philippine Islands and the defendant demurred. The court held that the exchange was not a commercial association within the statute, but a governmental agency.

"In his second assignment of error the appellant contends that the lower court committed an error in deciding that the plaintiff, the Post Exchange, 31st Infantry, is not a commercial association and is not subject to the commercial laws of the Philippine Islands. We have made a careful examination of the Acts of Congress authorizing the organization of post exchanges at the different stations of the United States Army and the regulations of the War Department in accordance therewith, governing and controlling said post exchanges, and are fully persuaded that they are not commercial organizations. While

*This case has not been officially reported.

> they are in a sense associations of military organizations for business purposes. They are simply governmental agencies or instrumentalities expressly recognized by Congress in the annual appropriation Acts, and are designed to carry out a governmental purpose. Dugan v. U. S., 31 Court of Claims 158. They are simply governmental agencies organized for the purpose of the accommodation of the army and the soldiers and are, in no sense, commercial organizations."

A subsequent decision of the Supreme Court of the Philippine Islands concerning post exchanges will be reviewed later.

(b) The War Department and the Judge Advocate General have consistently ruled that the post exchange is a federal agency.

The War Department itself has always insisted that post exchanges are federal agencies and departments of the government. As early as November 21, 1899, the Judge Advocate General ruled upon the question, holding:

> "A post exchange is not legally liable for local or municipal taxes or licenses, on the sale of commodities for the exclusive use of persons in the military service, as such an exchange is an instrumentality of the Government of the United States. C. 7324, Nov. 21, 1899 (Dig. Ops. J. A. G., Rev. Ed. 1904, p. 559, and A. R. 210-65, par. 77f)."

The Judge Advocate General later held (Dig. Ops. of J. A. G., July 1, 1912-April 1, 1917, p. 459) that as a government agency the post exchange was not required to pay a dealer's tax upon the sale of tobacco:

> "By the act of October 22, 1914, commonly known as the War Revenue Act, it was provided that—'deal-

ers in tobacco . . . whose annual receipts from the sale of tobacco exceed $900 shall each pay $4.80 for each store, shop, or other place in which tobacco, in any form, is sold.' Held, that post exchanges, being Government agencies, are not required to pay the tax (*Duncan v. U. S.*, 31 Ct. Cls. 158) (40 100 J. A. G. Dec. 30, 1914)."

The Judge Advocate General for the same reason held that post exchanges displaying motion pictures and billiard tables and bowling alleys at post exchanges are not subject to the payment of internal revenue tax (Ops. J. A. G., 40 100, Jan. 30, 1915); and that post exchanges are not liable for income tax under 40 Stat. 300, 333 (Dig. Ops. J. A. G., April, 1918, p. 26).

The Judge Advocate General similarly held (Ops. J. A. G., Vol. II, 1918, p. 371 May 17, 1918) that no tax should be collected for admission to places of amusement operated by post exchanges, stating:

> "Post exchanges are conducted solely for the benefit of enlisted men under the supervision of the Government. No part of the proceeds derived from admission fees at places of amusement conducted by post exchanges is payable to any individual, but the entire amount thus collected is used for the benefit of enlisted men in the military service. The Commissioner of Internal Revenue, construing the War Revenue Act of October 3, 1917 (40 Stat. 300, 318), has issued instructions that no tax should be collected for admissions to places of amusement operated by or under the supervision of the Government where no part of the proceeds is payable to individuals, but all such proceeds are exclusively for the benefit of persons in the military service. Consequently, the admission fees at places of amusement conducted by

such post exchanges, are not subject to the war tax on admission provided for by section 700 of said act."

The Judge Advocate General has likewise held that "an automobile operated by a post exchange for the benefit of its members and their families" is not subject to taxation under 40 Stat. 1057, 1128 (Dig. Ops. J. A. G., 1919, p. 465); that "a post exchange purchasing . . . merchandise for sale to the military and civilian personnel at the post is a Government facility, not a dealer . . . and is not required to collect a war tax on such sales" (Dig. Ops. J. A. G., 1924, p. 17); and that "Soft drinks sold at an officers' club are exempt" from the tax imposed by 40 Stat. 1057, sec. 630 (Digs. Ops. J. A. G., 1919, pp. 181, 320).

The War Department has similarly held that post exchanges are not subject to state taxation, stating (Dig. Ops. J. A. G., 1929, p. 11):

> "The post exchange system was inaugurated, established, and is being maintained with Congressional sanction to discharge Governmental obligations in the lawful exercise of constitutional powers, and is a Governmental agency. Being the means employed for the performance of Federal functions, purchases by it can not be legally subjected to state taxation. Further, state statutes do not have application to it when it is located upon lands acquired by the Federal Government in accordance with the provision of the Federal constitution, because such lands have ceased to be a part of the state and have become Federal territory over which the Federal Government has complete and exclusive jurisdiction and power of legislation. Such lands being beyond and without the state, both in a jurisdictional and legal sense (though geographically

within the borders of the state), commerce moving thereto or therefrom, from or to a state or territory, constitutes interstate commerce, and as such cannot be subjected to other than Federal taxation or regulation."

(c) The Navy Department's ruling follows that of the Army.

The Secretary of the Navy has ruled that the California motor vehicle fuel tax is not applicable to gasoline bought by the Navy and resold through commissary stores. His opinion follows:

"Department of the Navy
Washington, D. C.

File: JJT 6/LH 3(16) (280508)
CA:LM Feb. 28, 1929

J. A. McNair, Esq.,
Associate General Counsel, The Texas Company
929 South Broadway
Los Angeles, California
Sir:

There has been brought to my attention your letter of January 31, 1929, addressed to the Bureau of Supplies and Accounts, with respect to the application of the California State Tax to gasoline purchased by the Navy and resold through commissary stores.

Congress has authorized the Navy to sell gasoline to its personnel by an act approved March 3, 1909 (35 Stat. 768; 34 U. S. Code, sec. 533), which provides that

'Such stores as the Secretary of the Navy may designate may be procured and sold to officers and enlisted men of the Navy and Marine Corps, also to civilian employees at naval stations beyond the continental limits of the United States and in

> Alaska, under such regulations as the Secretary of the Navy may prescribe.'
>
> Commissary stores of the Navy, which exist by virtue of this statutory authority and in necessary execution thereof, are clearly instrumentalities of the United States, created by Congress in the exercise of its constitutional power 'to make rules for the government and regulation of the land and naval forces.' As stated by the Supreme Court in the Panhandle Oil Company case, *supra*, 'the States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions.'
>
> In view of the foregoing I am convinced that the States cannot exact payment of taxes on gasoline sold to the Navy, irrespective of the use made of said gasoline after title thereto has passed to the United States. The inclusion in future bids of the provision suggested in your letter, which would distinguish between gasoline purchased 'for the official use of the U. S. Government', and that purchased 'for the purpose of commissary distribution', cannot, therefore, receive my approval . . .
>
> Very respectfully,
>
> (Signed) Curtis D. Wilbur."

In *War Department, J. A. G. O., July 19, 1929*, it was held that gasoline sold to the Post Exchange, Presidio of Monterey, was not subject to the California gasoline tax, as set forth in the following communication from the Judge Advocate General to the Office of the Commanding General at the Presidio of San Francisco:

"Headquarters Ninth Corps Area
Office of the Commanding General
Presidio of San Francisco

331.3 (AG M)

August 1, 1929.

Subject: State Gasoline Tax on Post Exchange Sales Gasoline.

To: Commanding Officers, all Posts, Camps and Stations within the territorial limits of the Ninth Corps Area.

For their information and guidance the following is a War Department decision in connection with taxation by states of Gasoline sold to Post Exchanges:

"Civil Affairs No. 2

JAG 463.7 5th Ind.

"War Department, J. A. G. O. July 19, 1929. To the Adjutant General.

"2. The question involved in this case is whether gasoline sold to a post exchange is subject to the tax of three cents per gallon imposed under Act 2964 of the State of California as amended by acts appearing in Statutes of California 1925, p. 659 and 1927, p. 1308. Section 10 of the act provides that it shall not apply to any motor vehicle fuel sold to the Government of the United States or to any department thereof for the official use of the government.

"3. A similar question was before the War Department on the occasion of correspondence with the legal department of the Texas Company of Los Angeles, California. Under date of May 8, 1929, the Secretary of War stated:

'It is the unalterable view of the War Department that in making sales of gasoline to the an-

thorized purchasers, a post exchange is carrying out the policy of the Government, is engaged in Governmental business, and that sales of gasoline made to a post exchange are not subject to a State gasoline excise law because of the principle enunciated in the case of Panhandle Oil Co. v. Mississippi, 277 U. S. 218. I also incline to the view that where the post exchange is located on a federal reservation, it is not within the jurisdiction of any state, and gasoline shipped by state dealers to such post exchanges on the reservation would be subject to the constitutional protection accorded property moving in interstate commerce.'

"4. The above quoted ruling of the Secretary of War disposes of the present question."

(d) Analysis of two cases which challenge the character of the post exchange as a federal instrumentality.

Two cases have been found holding that the post exchange is not a federal agency. The first of these is *Keane v. U. S.*, 272 Fed. 577. It does not involve the constitutional limitations upon the power of the state to tax and we believe that it in no way affects the present issue. The only question presented in the *Keane* case was the construction of a penal statute. The court was not required to determine whether a post exchange is an official department of the government. "The question" said the court, "we must decide is whether or not a post exchange is *such a lawful department of the government as to bring it within the protection of section 37 of the Criminal Code*," and it was held that although departments might be created and regulations might be lawfully prescribed by executive order, these regulations could not bring individuals who violated them within the terms of a penal

statute unless Congress expressly so provided. Section 37 of the Criminal Code reads as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The court held that it could not be extended to include conspiracy to defraud on the part of a post exchange officer for the reason that "a violation of the departmental regulations is not a criminal offense unless the Congress distinctly makes it so", and to hold otherwise would be tantamount to giving the Secretary of War "the authority to enact a criminal statute".

It is noteworthy that the conclusion of the majority of the court was based upon two erroneous premises. The opinion cites an act of Congress of July 16, 1892 (27 Stat. 178) declaring that "hereafter no money appropriated for the support of the army shall be expended for post gardens or exchanges," and adds that this is the only reference to a post exchange that the court has "been able to find in the mass of statutes passed by Congress from its first session down to the present".

The numerous acts of Congress to which we have referred in which appropriations for post exchanges have been made in express terms, seem to have escaped the court's attention. Indeed, the court was under the misapprehension that post exchanges do not enjoy federal appropriation. The court said (p. 587):

> "We think that this highly penal statute cannot apply to any lawful department, so as that a fraud upon the United States can arise from or be involved in any transaction concerning it, unless such lawful department is created by Congress or directly authorized by it, and in addition thereto it must be 'such a lawful department' as that Congress appropriates the public moneys to maintain and operate. Clearly the post exchange described in the indictment in this case is not such a lawful department of government."

The majority of the court in the *Keane* case also appear to have assumed that the War Department has recognized the so called "purely private" character of post exchanges, stating (pp. 581-2):

> "In this connection it may be mentioned that these post exchanges are such purely private organizations for the convenience and pleasure of the soldiers themselves that they have been required to pay floor taxes on tobacco under section 702 of the Revenue Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, Sec. 6204d). The Judge Advocate General's Office, a branch of the War Department, held that these exchanges were subject to floor taxes on tobacco. See Opinions of the Judge Advocate General, 3313, February 28, 1919."

This is the only ruling of the Judge Advocate General which the court cites. We have seen that it was reversed by the *Panhandle* case. We have also seen that the Judge Advocate General has uniformly held that post exchanges are official departments of the government. In view of this situation, it is patent that the court was improperly advised in its assumption that the War Department regarded post exchanges as private in character.

The second case at variance with our contentions concerning the status of the post exchange is *Thirty-first Infantry Post Exchange v. Posadas*, 54 Phil. 866. Plaintiff sought an injunction to restrain the Collector of Internal Revenue in the Philippine Islands from collecting a tax levied by the insular government on sales made to the post exchange. The court considered the *Panhandle Oil Company* case but distinguished the situation presented in the case before it on three major grounds. It argued that (1) while the plaintiff in error in the *Panhandle Oil Company* case was an oil company which had been sued by the state to recover taxes, the plaintiffs in the Philippine case were not the persons who had paid the tax; (2) in the *Panhandle Oil Company* case the law in question was the act of a state legislature, but in the Philippine case the laws in question were acts of the Philippine legislature which had been ratified by Congress after passage and raised to the level of organic laws; and (3) in the *Panhandle Oil Company* case the sales had been made to the Coast Guard Fleet and a Veterans' Hospital which were instrumentalities authorized by the constitution, but in the Philippine case the sales were made to a post exchange not so authorized.

Certiorari was denied by this court (283 U. S. 839). In the petition for the writ six questions were presented, including (a) the right of the purchaser rather than the seller to maintain the action, and (b) the effect of congressional ratification upon the Philippine statute. The refusal of this court to review the case may well have been based upon its concurrence in the views of the insular court on either of these two points. The question of the status of the post exchange as a federal instru-

mentality was but one of the six questions presented. It is earnestly submitted that in this regard the Philippine court was in error and that the affirmative case which is made in the long line of authorities and opinions which we have cited supports and requires the exemption of post exchanges from the levy of the California tax. The questions of the proper party to the action and congressional consent to the imposition of the tax are not present in our case. We are returned, therefore, to the situation presented in the *Panhandle Oil Company* case if the post exchange as a federal instrumentality on a plane similar to that of a Veterans' Hospital or a Coast Guard Fleet.

CASES CITED

	Page
Concessione Company vs. Morris, 409 Wash. 46	6
Federal Compress and Warehouse Company vs. McLean	5
Pacific Company Ltd. vs. Johnson, 285 U. S. 480	3
Pan American Petroleum Corporation vs. Alabama	7
People vs. Monne, 203 Cal. 782	6
People vs. Ventura Refining Co., 204 Cal. 286, 294	1
State Tax on Foreign Held Bonds, 82 U. S. 300, 319	3
Surplus Trading Company vs. Cook, 281 U. S. 647	2, 6
United States vs. Unzeuta, 281 U. S. 138	6

IN THE

Supreme Court of the United States

STANDARD OIL COMPANY OF CALIFORNIA, *Appellant*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Appellee*.

APPELLANT'S REPLY BRIEF.

The clear cut issues of federal and state jurisdiction and of the nature of the tax involved in this case are not to be confused by cases that are not apposite or conditions that do not obtain.

The facts are simple. The Attorney General of California concedes and the Supreme Court of California states in its opinion that the sale sought to be taxed was made in the Presidio and that federal jurisdiction over the Presidio is exclusive. The point of difference between us is the incidence of the tax. To determine this we look to the statute.

> "Every distributor shall * * * pay a license tax * * * for each gallon of motor vehicle fuel * * * sold and delivered by him in this state."

The tax is labelled a license tax. It is in effect a sales tax and the tax is ultimately paid by the consumer. The State Supreme Court has recognized this in People v. Ventura Refining Co., 204 Cal. 286, 294. But whatever the

tax be called, it has to be in its very nature a tax upon the exercise of a privilege. What is the taxable privilege? Sale. Where? Within the state, namely, within the state's taxing jurisdiction. In this case the sale concededly took place in territory under exclusive federal jurisdiction. That is the beginning and end of the case.

The State Supreme Court has never suggested that the tax is levied with reference to anything but a sale. On the contrary it states that the question in this case is

> "whether *sales* and deliveries of gasoline at a military reservation under the sole jurisdiction of the United States * * * are to be excluded in fixing the license fees to be paid by the distributor"

and concludes that the

> "manifest intention of the act was to include all *sales* completed within the geographical confines of the state and for this purpose said military reservation was to be included like all other territory."

The *sale* is the thing. If there be one that the state can reach within its jurisdiction, there is a tax; if there be none, there is no tax. The act has always been construed in one way, the only way its clear and direct terms permit. It imposes a license tax upon the exercise of a privilege. The person taxed for exercising the privilege is the distributor. The privilege taxed is the making of a sale. The tax is paid by the distributor but collected from the consumer. The measure of the tax is the amount sold, and in applying the measure the state is necessarily confined to events occurring and privileges exercised within its jurisdiction.

The Attorney General recognizes that a direct property tax cannot be levied by the state or county in the Presidio because of the ruling of this court in *Surplus Trading Company vs. Cook*, 281 U. S. 647. He suggests, however, that there may be a difference in the case of a privilege or occupation tax (Appellee's Br. p. 13). But as far as juris-

dictional authority to impose a tax is concerned, there can be no difference between a direct tax and an excise tax. This Court has so ruled in *State Tax on Foreign Held Bonds*, 82 U. S. 300, 319.

The Attorney General is therefore compelled to seek some taxable incident within state jurisdiction to support the levy. He suggests various theories but he can point to no syllable in the statute to support any of them. On pages 8 and 9 of Appellee's Brief we find the following:

> "The State of California * * * is not attempting to tax anything tangible or intangible within the Presidio. It is not concerned with the Presidio as a matter of fact. It is concerned with what is done in the State by a corporation subject to the laws of the State. The tax operates upon the corporation, not by reason of any jurisdiction which the State attempts to exercise within the Presidio, but by reason of jurisdiction which the State has over the corporation and over its operations in the State generally. Without a place of business in the State and without gasoline produced in or imported into the State no sale could have been made to the Post Exchange by appellant."

This theory of the net hints at the possibility that the tax may be upon the company for the privilege of doing business generally or for producing or importing gasoline. But the gasoline tax act does not impose a tax upon the privilege of doing business generally. That purpose is accomplished by the State Bank and Corporation Franchise Tax Act which this Court had before it in *Pacific Company Ltd. v. Johnson*, 285 U. S. 480. Nor is the tax levied upon production or importation. The state Supreme Court has never suggested any construction of the act which would support this strained proposal of the Attorney General. Certainly it has not done so in this case. If anything, it has done the opposite by holding that the legislative intent was to reach all sales, as such, within the Presidio. Furthermore, a state has no power to levy an excise tax

measured solely by business done or a privilege exercised entirely beyond its jurisdiction. There is no more justification for the inclusion of Presidio sales than there would be for the inclusion of Oregon and Washington sales.

Again on page 16 of Appellee's Brief we find:

> "The State imposes a tax upon a resident corporation measured in part by a transaction originating outside the Presidio but terminated within the Presidio by a simple act of delivery of goods, wares or merchandise. Had the Government desired to do so, it could have prevented the delivery within the Presidio, and thus the transaction would have been completed on the outside. But the Government consented to delivery within its borders * * * and to this extent it waived whatever jurisdictional powers it might otherwise have exerted and no immunity attached to the transaction."

It is difficult to discover precisely what this argument imports. The term "resident corporation" and the reference to a transaction originating outside the Presidio suggest incidents within state jurisdiction but like the preceding quotation they come no nearer to the text of the act and the thing taxed. The intimation of a waiver can hardly be intended seriously. Is immunity from direct property taxation waived by officers and enlisted men who take tangible personalty to their homes on the reservation and keep it there?

The Attorney General's real difficulty is well shown on page 20 of his brief. He says:

> "Had the California statute imposed the tax upon *withdrawal* of the gasoline from storage there could be no question of its validity in that respect. * * *
>
> "Can it make any difference or can any distinctions be drawn merely because the tax is payable by reason of a *sale* of gasoline instead of upon its *withdrawal* from storage?
>
> "It would appear that no sound reason can be advanced why the tax is not as valid in the former instance as in the latter."

This is the very point at issue. The California statute does not tax *withdrawal*, an event occurring solely which in this case might properly be assumed to have occurred within the state's jurisdiction. It taxes *sale*, an event which in this case occurred beyond its jurisdiction. In our opening brief we pointed out the reasons for the legislative policy which confines the tax to sales and excludes withdrawal and use. We also referred to the gasoline tax cases in which this court has upheld a levy upon withdrawal, storage or use. We may now refer to the most recent pronouncement by this court, to similar effect, in *Federal Compress and Warehouse Company v. McLean*, sustaining the Mississippi tax on the operation of a cotton compress and a warehouse within the state. We believe we appreciate fully the force of these decisions and if the California statute taxed withdrawal, as the Attorney General suggests, or any other privilege exercised within its jurisdiction and properly taxable, a different question would be presented in this case.

On page 23 of Appellee's Brief the following appears:

> "Under our statute, although the tax is a privilege tax imposed upon the distributor of motor vehicle fuel, the intent of the law is that the distributor shall collect the tax from the consumer who uses such fuel in motor vehicles operated upon the public highways of the State. * * *
>
> "It is an undisputed fact that all distributors do include the tax in the price charged for gasoline and that the consumers ultimately pay the tax."

Again on page 65,

> "The tax is, in effect, a just and reasonable charge for the use of State highways and other facilities furnished to the motoring public by the State."

Here the intimation is, that since the consumer ultimately pays the tax, the thing taxed is the consumer's use of the highways. But the California legislature has

not said so. A person purchasing gasoline outside the state is not taxed for using the highways within it. There is no measure for a highway tax. The tax is upon the seller for the privilege of making a sale and not upon the consumer for the privilege of using the highway.

In every instance, we are returned to our starting point. This court can hardly be asked to disregard the nature of the tax imposed by the California law, as defined by the State Supreme Court, and to write a new measure for the purpose of finding a taxable incident within state jurisdiction.

Throughout, we have said that the California gasoline tax is properly to be regarded as a license tax levied upon the distributor or seller for the privilege of making a sale. But whether it be labeled a sales tax or business tax or distributor's tax, it is clear in this case that the sale was made, the business done, and the distribution accomplished entirely within the Presidio and beyond state jurisdiction.

The Attorney General dismisses as not in point and without analysis the two recent decisions of this court in *Surplus Trading Company vs. Cook*, 281 U. S. 647, and *United States vs. Unzeuta*, 281 U. S. 138, and the decision of the Supreme Court of Washington in *Concessions Company vs. Morris*, 109 Wash. 46. These decisions are treated at length in our opening brief and we earnestly submit that they govern this case.

The Attorney General also disposes of *People v. Mouse*, 203 Cal. 782, certiorari denied by this court, 278 U. S. 614, as not pertinent, despite the fact that that case holds, as the trial judge states in his opinion, that if a thief were to steal at the Presidio the gasoline here involved, the state would be powerless to punish him. The trial judge aptly observes (R. p. 62):

> "How can it be said that goods delivered in the Presidio are still in the State for the purpose of measuring a tax when a theft of the same goods would not be 'in the State' for the purpose of trial and punishment?"

Brief reference may be made to the recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Pan American Petroleum Corporation v. Alabama*, cited by the Attorney General and not yet reported. The jurisdictional question here presented was not decided, the court holding that because the Alabama statute included the term "*with drawing from storage*," it was unnecessary to pass upon our question. Concerning the character of the Post Exchange as a federal instrumentality, the only authority cited by the court for the statement which is quoted in Appellee's Brief (p. 60) is the decision of the Supreme Court of California in this case now before this court for review.

The Attorney General complains that if this court reverses the decision of the State Supreme Court,

> "the State is effectually barred from the exercise of its legitimate functions, no matter what its laws may provide, merely on the ground that jurisdiction has been ceded to the Federal Government over the territory comprising the reservation" (Appellee's Brief, p. 10).

It is to be assumed that this is precisely what the state and the federal government contemplated when the cession of 1897 was made. And may it not be suggested that if after cession the State were permitted to invade federal territory the federal government itself might well be "effectually barred from the exercise of its legitimate functions"?

Respectfully submitted,

OSCAR SUTRO,
FELIX T. SMITH,
V. K. BUTLER, JR.

Washington, D. C.;
January 9, 1934.

TOPICAL INDEX

	Page
OPENING STATEMENT	1
STATEMENT OF FACTS	2.
APPELLANT'S CONTENTIONS	4
APPELLEE'S CONTENTIONS	4
APPELLEE'S ANSWER TO APPELLANT'S CONTENTIONS—	
FIRST CONTENTION	5
SECOND CONTENTION	20
THIRD CONTENTION	24

TABLE OF CASES CITED

	Page
Alward vs. Johnson, 282 U. S. 509	27
Atchison, Topeka and Santa Fe Ry. Co. vs. Collins, 294 Fed. 742	51
Bekins Van Lines vs. Riley, 280 U. S. 804	28
Central Pacific R. R. Co. vs. California, 162 U. S. 91	47
Choctaw O. & G. R. R. Co. vs. Mackey, 256 U. S. 531	47
Clark vs. Poor, 274 U. S. 534	21
Concessions Co. vs. Morris, 109 Wash. 46, 186 Pac. 655	7
Cornell vs. Coyne, 192 U. S. 418	41
Denman vs. Clayton, 282 U. S. 514	41
Dugan vs. United States, 34 Court of Claims, 456, 468	26
Eastern Air Transport, Inc. vs. S. C. Tax Com., 285 U. S. 147	20, 21
Edelman vs. Boeing Air Transport, Inc., 289 U. S. 249	20, 21
Educational Films Corp. vs. Ward, 282 U. S. 379	40
Fidelity & Deposit Co. vs. Philadelphia, 240 U. S. 319	47
Flint vs. Stone Tracy Co., 220 U. S. 107	40
Fort Leavenworth Ry. Co. vs. Lowe, 114 U. S. 525	15
Gondy vs. Meath, 203 U. S. 146	47
Gromer vs. Standard Dredging Co., 224 U. S. 362	47
Gregg Dyeing Co. vs. Query, 52 S. C. R. 631	63
Hart Refineries vs. Harmon, 278 U. S. 499	20
Hendrick vs. Maryland, 235 U. S. 610	21
Indian Motorcycle Co. vs. U. S., 51 S. C. R. 601	41
Interstate Transit, Inc., vs. Dick Lindsey, 51 S. C. R. 380, 283 U. S. 183	17, 21
Kane vs. State of New Jersey, 242 U. S. 160	21
Keane vs. United States, 272 Fed. 577	51, 63
Lash's Products Co. vs. U. S., 278 U. S. 175	41
Metcalf & Eddy vs. Mitchell, 269 U. S. 514	41

TABLE OF CASES CITED—Continued

	Page
Nikis vs. Commonwealth of Va., 144 Va. 618, 131 S. E. 236	12
North Carolina & St. L. Ry. Co. vs. Wallace, 288 U. S. 249	20
Pan American Petroleum Corp. vs. State of Alabama, ---- Fed. ---- decided by the U. S. Circuit Court of Appeals for Fifth Circuit on November 15, 1933	58, 63
Panhandle Oil Co. vs. Mississippi, 277 U. S. 218	14
Payne vs. Richardson, 189 Cal. 103	51
People vs. Mouse, 203 Cal. 782	7
People vs. Standard Oil Co. of California, 85 Cal. Dec. 559, 22 Pac. (2d) 2	1, 63
People vs. Ventura Refining Co., 204 Cal. 286	23, 64
Postal Telegraph Cable Co. vs. City of Richmond, 249 U. S. 252	21
Pullman Co. vs. Richardson, 185 Cal. 484, 261 U. S. 330	51
Railroad Co. vs. Peniston, 18 Wall. 5	47, 50
Shaw vs. Gibson-Zabniser Oil Corp., 276 U. S. 575	47
South Carolina vs. United States, 199 U. S. 437	44
Sprout vs. City of South Bend, 277 U. S. 163	21
Storaasli vs. Minnesota, 283 U. S. 57	17
Surplus Trading Co. vs. Cook, 281 U. S. 647	7, 10, 14, 16
Thirty-first Infantry Post Exchange vs. Juan Posadas, Jr., 54 Philippine Reports 866	55, 63
United States vs. Cordy, 58 Fed. (2d) 1013	10
United States vs. Unzeuta, 281 U. S. 138	7
Wheeler Lumber Co. vs. United States, 281 U. S. 572	41
Willcuts vs. Bunn, 282 U. S. 216	40
Yellowstone Park Transportation Co. vs. Gallatin Co., 31 Fed. (2d) 644	8

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1933

No. 347

STANDARD OIL COMPANY OF CALIFORNIA,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

BRIEF OF APPELLEE, STATE OF CALIFORNIA

This is an appeal from a judgment of the Supreme Court of the State of California (*People* vs. *Standard Oil Company of California*, 85 Cal. Dec. 559, 22 Pac. (2d) 2).

The question involved is whether appellant, a distributor of motor vehicle fuel, may be taxed by the State by reason of the sale by it of motor vehicle fuel to the Post Exchange located at the Presidio

of San Francisco, which is a military reservation of the Federal Government over which the Government exercises exclusive jurisdiction.

Before going any further we desire to say that this brief is being written without having before us any brief by appellant other than the brief filed in the Superior Court and the brief filed in the Supreme Court of California. We have not received appellant's brief in this court, but we understand from counsel for appellant that the points to be made here are the same as those made before the Supreme Court of California.

I

STATEMENT OF FACTS

The Motor Vehicle Fuel Act adopted in 1923 (Chapter 267, Stats. 1923, p. 571, as amended) provides for a license tax on the sale and distribution of motor vehicle fuel, subject to certain exceptions, only one of which is material here. Pursuant to the provisions of this act appellant filed its report with the State Board of Equalization for the quarter of the year ending September 30, 1929, in which report appellant reported the sale and distribution of four hundred and twenty gallons of gasoline to the Post Exchange at the Presidio of San Francisco and, claiming that said sale was exempt from the tax, failed to pay the tax thereon. Thereafter the State instituted this action to recover from ap-

pellant the tax of three cents a gallon which the State claims appellant should have paid.

Section 10 of the act, as amended by Statutes of 1927, page 1309, reads as follows:

> "The provisions of this act requiring the payment of license fees shall not be held or construed to apply to motor vehicle fuel imported into this State in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce nor to any motor vehicle fuel exported or sold for exportation and exported for use outside this State, nor to any motor vehicle fuel *sold to the government of the United States or any department thereof for official use of said government* but every distributor shall be required to report such exports and sales to the State Board of Equalization in such detail as that board may require."

By a further amendment in 1927 (Stats. 1927, page 1565) the tax was raised from two cents a gallon to three cents a gallon. Both of these amendments were in effect when the tax here in question was assessed.

In section 1 of the act it is provided that a "distributor shall mean and include every person, firm, association or corporation who refines * * * motor vehicle fuel in this State and sells the same *in this State* * * *," and in section 3 of the act it is provided that a tax of two cents (now three cents) shall

be paid by every distributor for each gallon of motor vehicle fuel "refined * * * and sold and delivered by him *in this State* * * *."

II

APPELLANT'S CONTENTIONS

The appellant's contentions in opposition to the validity of the tax are three in number and are thus expressed:

"(1) The gasoline tax applies only to sales made within the State. California has ceded to the United States exclusive jurisdiction of the Presidio, and in both a jurisdictional and a territorial sense, sales of gasoline in the Presidio are made without the State.

(2) Deliveries from San Francisco to the Presidio constitute commerce within the exclusive jurisdiction of the United States.

(3) The gasoline tax does not apply to fuel sold to the government of the United States or any department thereof for the official use of the government. The Presidio Post Exchange is a department of the United States Army, performing an official function of the Federal Government."

III

APPELLEE'S CONTENTIONS

The contention of the State in this case is that a sale and distribution of gasoline to a Post Exchange is not exempt from the tax under the provisions of

section 10 of the act for the reason that a Post Exchange is not a department of the Government of the United States and for the further reason that a sale to a Post Exchange is not a sale for the official use of the Government of the United States.

The State contends, therefore, that appellant should have paid the license tax of three cents a gallon by reason of the sale of said four hundred and twenty gallons of gasoline so sold and distributed to said Post Exchange.

In accordance with the stipulation of facts (Tr. Rec., p. 5, Par. VI), it is conceded that the Presidio of San Francisco is occupied and held by the United States as a military reservation, and that jurisdiction over said reservation was ceded to the United States by the State of California by the act approved March 9, 1897.

It is further conceded that delivery of the gasoline in question was made to the Post Exchange within the boundaries of the Presidio Military Reservation.

IV

RESPONDENT'S ANSWER TO APPELLANT'S CONTENTIONS

First Contention

Appellant's first contention is that because exclusive jurisdiction over the Presidio of San Francisco has been granted by the State of California to the Federal Government, the Presidio is

not "in the State of California" in either a jurisdictional or a territorial sense.

But in this connection it should be noted that in the act of March 2, 1897 (Statutes 1897, page 61), there is a recognition in section 1 thereof of the fact that geographically and territorially, and to a limited extent jurisdictionally, the Presidio is *in* the State of California, for in that act it is provided:

> "And provided further, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this state against any person or persons charged with crimes committed without said lands * * *."

Neither civil process nor criminal process of the State could be served or executed on lands not within the boundaries of the State, and therefore the act of cession by its very terms shows that said lands within the Presidio of San Francisco are "in" the State of California. By no stretch of the imagination can such lands be conceived of as being any place except "in this State."

In its brief in the State Supreme Court appellant said:

> "The United States must be recognized as having exclusive jurisdiction for all purposes, and since this is so, the Presidio is as much without the State of California as any other state or foreign territory."

As previously stated, the act of cession itself refutes this statement. From the premise that the United States has exclusive jurisdiction over the Presidio the conclusion may not accurately be drawn that the Presidio is not "in" the State of California.

In support of its contention here appellant cites certain cases which may, we think, readily be disposed of.

In *United States* vs. *Unzeuta,* 281 U. S. 138 (1930), it was held that the Federal courts had jurisdiction over a crime committed on a Federal reservation in Nebraska since in the act of cession there was no express reservation of jurisdiction over such crimes by the State.

No such question is involved here and we do not see wherein that case is material.

In *Surplus Trading Co.* vs. *Cook,* 281 U. S. 647 (1930), the only question involved was whether a county in the State of Arkansas could tax personal property situated on a Federal military reservation. In deciding that the tax was invalid this court decided no question involved in the case at bar.

The case of *People* vs. *Mouse,* 203 Cal. 782 (1928)—certiorari denied by this court, 278 U. S. 614—was similar to the *Unzeuta* case and decided nothing involved here.

The case of *Concessions Co.* vs. *Morris,* 109 Wash. 46, 186 Pac. 655 (1919), decided the same question that was involved in the case of *Surplus Trading*

Co. vs. Cook, supra. While that case is not in point for the reasons already stated it may be pointed out that in the *Concessions Company* case the Supreme Court of Washington went much further than this court did in the *Surplus Trading Company* case, in saying that the act of cession created an "independent sovereignty, the territory of which is surrounded by the State of Washington, but over which the State of Washington has no jurisdiction."

We can find no authority for that statement in any of the decisions of this court.

The case of *Yellowstone Park Transportation Co. vs. Gallatin County et al.*, 31 Fed. (2d) 644, (certiorari denied, 280 U. S. 555) preceded the case of *Surplus Trading Co. vs. Cook* and involved the same question, namely, whether personal property located on a Federal military reservation was subject to local taxation.

In all three of the cases involving that question the effort of the State, through its local subdivision, the county, was to follow personal property into the reservation and there lay its hand upon it and subject it to a tax.

But have we that case here?

In our opinion we have not. The State of California is not attempting to follow the gasoline into the Presidio and to lay a tax upon it there. It is not attempting to tax anything tangible or intangible within the Presidio. It is not concerned with the

Presidio as a matter of fact. It is concerned with what is done in the State by a corporation subject to the laws of the State. The tax operates upon the corporation, not by reason of any jurisdiction which the State attempts to exercise within the Presidio, but by reason of jurisdiction which the State has over the corporation and over its operations in the State generally. Without a place of business in the State and without gasoline produced in or imported into the State no sale could have been made to the Post Exchange by appellant.

If appellant's contention is correct, it could engage in this business in the State for the sole purpose of producing gasoline and selling it to post exchanges on military reservations, and the State would be powerless to object or interfere, or to tax appellant in respect to such sales.

It is clear that the statute contemplated no such situation. The only exemption in the statute so far as this case is concerned is in respect to gasoline sold to the Government of the United States, or to one of its departments, for the *official use* of said Government.

Assuming for the sake of argument on this point that the Post Exchange is not a department of the Government, or that sales to it are not for the official use of the Government, then it is perfectly plain that there is no exemption allowed by the statute on such sales, and the tax is due thereon. When the statute speaks of sales "in this State"

it refers, of course, to sales made within the geographical boundaries of the State.

Appellant's contention involves the conclusion that even if the statute had specifically and expressly provided that sales to a Post Exchange were taxable, the result would still be that the tax was invalid, because it would be beyond the power of the State to measure the tax in any part by a sale made on a Government reservation, due to the fact that the Government has exclusive jurisdiction over such reservation.

We do not think that the decision in

Surplus Trading Co. vs. Cook, supra,

can be carried to this extent.

If so, then the State is effectually barred from the exercise of its legitimate functions, no matter what its laws may provide, merely on the ground that jurisdiction has been ceded to the Federal Government over the territory comprising the reservation.

The remaining case relied upon by appellant herein is

U. S. vs. Cordy, 58 Fed. (2d) 1013.

The statute involved in that case differs in some respects from ours. It provides that the tax shall not be imposed on gasoline "exported from the State," and also provides that a producer is any person, etc., importing gasoline "for use, distribu-

tion or sale, *and delivery in*" the State of Maryland.

The points on which the Government relied for exemption were, first, that the Post Exchange was a Government instrumentality and, second, that the transaction involved interstate commerce and was therefore impliedly if not expressly exempt from taxation.

The court discussed the first point but found it unnecessary to decide it.

The second point was not discussed at all.

The case was decided upon the ground that the levying of the tax against sales to the Post Exchange "is not within either the express or implied meaning of the tax act itself."

In reaching this conclusion the court held (*a*) that Federal territory was *by implication* included in the exception granted exports from the State "to any other State or nation," and (*b*) that by the express language of section 211 (*c*), relating to sale and delivery in the State, it was indicated that the tax should not apply to sales to the Post Exchange, "that is to say, the delivery was not made within the State of Maryland which is a prerequisite for the application of the tax, in addition to use, distribution or sale within the State."

It is thus apparent that this case was decided upon points not raised and apparently not discussed, but even so the implication seems to be that if the *statute* had read differently, the case might have been decided differently.

As we have already pointed out our statute contains no implied or express exemption such as the court found in the Maryland statute. On the contrary, our statute in respect to exports must be given a different construction. It provides that its provisions shall not apply "to any motor vehicle fuel exported or sold for exportation *and exported for use outside this State.*"

The complaint in our case alleged that no part of the gasoline in question "was exported or sold for exportation and exported for use outside of said State," and this allegation of the complaint was not denied and therefore stands admitted.

This effectually disposes of the first point relied upon by the court in the *Cordy* case.

The second point may be similarly disposed of because there is no express language in our act, or any implication to that effect, that the *intent of the statute* was that the tax should *not* apply to such sales. On the contrary, the language of our statute is "in this State," and neither by implication or otherwise can the words "in this State" be construed to exclude any territory within the geographical limits of the State.

As opposed to appellant's contention here the following observations may be made:

In the case of

Nikis vs. *Commonwealth of Virginia*, 144 Va. 618, 131 S. E. 236,

Nikis was convicted of conducting a business without having procured a license as required by State statute. His place of business was located in a railway station at the south end of a bridge, on land purchased by the United States with the consent of the State. His defense was that the State had no jurisdiction of the premises.

It was held that the right of a State to tax the property of others located upon lands owned by the United States, although it can not tax such lands, will not be held to be abandoned by the State except for the most compelling reasons, and such reasons not appearing the defendant was held not to be entitled to immunity.

In the opinion the court referred to numerous decisions of the United States Supreme Court and also to the case of

> *Burke* vs. *Texas Company*, apparently unreported,

decided by U. S. District Judge Groner on July 21, 1923, in which it was held that a State gasoline tax was lawfully collected from Burke who had a gasoline pump upon land owned by the United States in the county of Arlington, Virginia.

It may here be observed that the *Nikis* case and the *Burke* case are not necessarily overruled by the *Surplus Trading Company* case, as the latter involved a direct tax on *property* situated on the reservation, while the former cases involved a license tax or occupation tax.

Neither the case of *Panhandle Oil Co. vs. Mississippi*, 277 U. S. 218, nor the *Surplus Trading Company* case decides the question here involved. This court would no doubt be greatly surprised at being told that the issue here involved was *res adjudicata* by reason of either or both of those cases. Certainly this court could readily distinguish this case more readily, in fact, than many other cases in which it has found distinguishing features. Appellant here was not engaged in business within the military reservation; it was not licensed by the Federal Government nor did it require any license; all it did was to accept an order for gasoline and fill the order by making delivery, just as it is accustomed to do in any other case. The fact that delivery was accomplished *on* the reservation would seem to be immaterial. If delivery had been made just outside the reservation, the defense here made would utterly fail.

In truth and in fact the whole question of tax or no tax is, by appellant's contention in respect to this point, made to depend upon the question of *where the title passed*.

That title passed *in* the State of California can not be denied, because the Presidio itself is within the State. If, then, the title to the gasoline passed in the State it follows that there was a sale of gasoline *in the State*, and by the express terms of the statute the tax became payable by reason of such sale.

Since the exemption does not arise from anything contained in the statute, then if it exists at all, it must be because of some restriction of the State's power to impose such a tax, and this could arise only from Federal legislation or from the Federal Constitution. There is no Federal legislation which would prevent the tax, so if there be any such restriction it must be found in the Constitution.

If the restriction is in the *Constitution*, it must be found in *Article I, Section 8, Clause 17*, wherein the power is given to Congress:

> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

It appears unnecessary for us to discuss the various ways in which the United States may acquire property in a State, or the different results which follow such acquisition in so far as the question of jurisdiction is concerned. That matter is treated of in

Ft. Leavenworth Ry. Co. vs. *Lowe*, 114 U. S. 525 (1885),

but we are not here concerned with those distinctions.

There is no question that in instances like the present, where the State has ceded jurisdiction without reservation except for the service of process, the United States acquires all such Federal jurisdiction *as the Constitution contemplates*. And while it has been held, as in

Surplus Trading Co. vs. Cook, supra,

that such jurisdiction is exclusive, the question here presented is still undetermined.

Is the State of California attempting to exercise any jurisdiction over the Presidio by imposing a tax on respondent for the privilege of carrying on a particular business in the State?

Assuredly it is not. Nor, on the other hand, is the United States exercising any jurisdiction over the Presidio which is interfered with in any manner, shape or form by the State of California in imposing this tax on one of its citizens.

It is inconceivable that the United States would claim that its sovereignty is being impaired or its jurisdiction within and over the Presidio is being ousted or interfered with by the State merely because the State imposes a tax upon a resident corporation measured in part by a transaction originating outside the Presidio but terminated within the Presidio by a simple act of delivery of goods, wares or merchandise. Had the Government desired to do so, it could have prevented the delivery within the Presidio, and thus the transaction would have been completed on the outside. But the Gov-

ernment consented to delivery within its borders of merchandise purchased by a nongovernmental agency, and to this extent it waived whatever jurisdictional powers it might otherwise have exerted and no immunity attached to the transaction.

Immunity from State interference is granted by the Constitution to interstate commerce but that immunity is not absolute. As we have shown in another part of this brief, commerce exclusively interstate may be required to pay its own way and may be compelled by the States to pay a fair contribution to the cost of maintaining public highways and other instrumentalities furnished by the States. Although this constitutes a *direct burden* on interstate commerce, it is nevertheless valid.

Interstate Transit, Inc., vs. *Lindsey*, 283 U. S. 183.

Along this same line we think the case of

Storaasli vs. *Minnesota*, 283 U. S. 57,

is in point.

The Constitution of Minnesota grants to the Legislature power to tax motor vehicles using the public streets and highways of the State on a more onerous basis than other personal property. The proceeds of the tax are required to be paid into the trunk highway sinking fund. Pursuant to this constitutional authority the Legislature enacted a law providing for the imposition of a motor vehicle registration tax.

Mason's Minnesota Statutes, 1927, sections 2672, 2704, as amended S. L., 1929, Chapter 335.

Pursuant to the statute, the Secretary of State filed in the office of the clerk of the District Court of Ramsey County a list of motor vehicles on which the tax and penalty for 1929 appeared delinquent. The appellant's automobile was included in the list and he filed an answer to the notice denying that any tax or penalty was due the State and alleging that he was the sole owner of the vehicle, was a nonresident of the State of Minnesota, a member of the military forces of the United States, quartered and resident upon Fort Snelling Reservation, and that the vehicle had not been operated for hire, had not been present within the jurisdiction of Minnesota upon its roads, highways or streets for any period of ten days, and was never operated thereon except as a visitor for brief periods. He also alleged that the reservation was solely under the control of the United States and that all governmental functions, including police power, traffic control and maintenance of highways, were vested in and exercised by the commanding officer under the laws of the United States to the total exclusion of control by the State. He further alleged that the reservation was no part of the State of Minnesota, that the commanding officer of the post had created and maintained a complete system of automobile registration

and that appellant's vehicle was duly registered under such laws and regulations.

Judgment was entered upon the pleadings for the tax and penalty and upon appeal to the Supreme Court of Minnesota that court affirmed the judgment. The appellant brought the case to the Supreme Court of the United States, having at all stages in the courts below asserted rights under the Fourteenth Amendment, which were passed on and determined adversely to his contentions. He claimed that the tax in question was a property tax and that the State could not tax property located on the Fort Snelling Reservation.

The State court held that the tax in question was both a property tax and a privilege tax. This court, however, held that the tax was an excise for the privilege of using the highways and that the claim that the State was attempting to tax appellant's property situate without its jurisdiction could not be sustained.

We ask the court to consider the similarity of that case to the one at bar.

In the former, the tax was an excise for the privilege of using the highways. Here it is an excise tax for the privilege of carrying on a certain business. There is no material difference between the two taxes.

In the former case, the car was the incident which drew to it the tax, even though the car was owned by an officer of the army and was located

on the military reservation. In the latter, the sale was the incident, and even if it be admitted that title passed on the reservation, nevertheless the validity of the tax as an excise tax on appellant was not affected thereby, since there was no attempt to tax property located on the reservation.

Had the California statute imposed the tax upon *withdrawal* of the gasoline from storage there could be no question of its validity in that respect.

Eddman vs. *Boeing Air Transport, Inc.*, 289 U. S. 249;

N. C. & St. L. Ry. Co. vs. *Wallace*, 288 U. S. 249;

Eastern Air Transport vs. *South Carolina Tax Commission*, 285 U. S. 147;

Hart Refineries vs. *Harmon*, 278 U. S. 499.

Can it make any difference or can any distinction be drawn merely because the tax is payable by reason of a *sale* of gasoline instead of upon its *withdrawal* from storage?

It would appear that no sound reason can be advanced why the tax is not as valid in the former instance as in the latter.

On this branch of the case we submit that appellant's contention is without merit.

Appellant's Second Contention

Appellant's second contention is that deliveries from San Francisco to the Presidio constitute commerce within the exclusive jurisdiction of the

United States, and that the imposition of the tax violates the commerce clause of the Federal Constitution.

This contention is answered by court decisions too numerous to mention. Among them are the following:

Edelman vs. *Boeing Air Transport, Inc.*, *supra*;
Hendrick vs. *Maryland*, 235 U. S. 610;
Postal Telegraph Cable Co. vs. *City of Richmond*, 249 U. S. 252;
Eastern Air Transport, Inc., vs. *South Carolina Tax Commission*, 285 U. S. 147;
Kane vs. *State of New Jersey*, 242 U. S. 160;
Clark vs. *Poor*, 274 U. S. 554;
Sprout vs. *City of South Bend*, 277 U. S. 163;
Interstate Transit, Inc., vs. *Dick Lindsey* (decided April 13, 1931, 51 Sup. Ct. Rep. 380), 283 U. S. 183.

The holding of those cases is that while a State may not lay a tax on the privilege of engaging in interstate commerce, nevertheless, interstate commerce must pay its own way and when a State at its own expense furnishes facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. In the *Interstate Transit* case the court said:

> "While a State may not lay a tax on the privilege of engaging in interstate commerce, *Sprout* vs. *South Bend*, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45, it may impose

even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. *Kane* vs. *New Jersey*, 242 U. S. 160, 168, 169, 37 S. Ct. 30, 61 L. Ed. 222; *Clark* vs. *Poor*, 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199; *Speyer* vs. *South Bend*, *supra*, pages 169, 170 of 274 U. S., 48 S. Ct. 569. As such a charge is a direct burden on interstate commerce, the tax can not be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, *Interstate Busses Corp.* vs. *Blodgett*, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551, or by the express allocation of the proceeds of the tax to highway purposes, as in *Clark* vs. *Poor*, *supra*, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. *Hendrick* vs. *Maryland*, 235 U. S. 610, 612, 35 S. Ct. 140, 59 L. Ed. 385; *Interstate Busses Corp.* vs. *Blodgett*, 276 U. S. 245, 250 252, 48 S. Ct. 230, 72 L. Ed. 551. Compare *Interstate Busses Corp.* vs. *Holyoke Street Ry.*, 273 U. S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530. But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity."

It is apparent, we believe, that the line of cases above mentioned determines the decision in the case at bar. Under our statute, although the tax is a privilege tax imposed upon the distributor of motor vehicle fuel, the intent of the law is that the distributor shall collect the tax from the consumer who uses such fuel in motor vehicles operated upon the public highways of the State.

People vs *Ventura Refining Co.*, 201 Cal. 286.

It is an undisputed fact that all distributors do include the tax in the price charged for gasoline and that the consumers ultimately pay the tax.

Our statute, as amended in 1929 (Stats. 1929, p. 1551), provides for the disposition of moneys received from the gasoline tax levies. These moneys are first placed by the Controller in the State treasury in the "Motor Vehicle Fuel Fund" and after payment of certain allowable refunds, one-half of the balance is appropriated to the counties in proportion to the number of motor vehicles registered therein. Section 13 of the act provides:

> "All such amounts so paid to the several counties shall be paid into a special road improvement fund. Such fund shall be expended by the county receiving it, *exclusively in the construction and maintenance of roads, bridges and culverts in such such county.*"

The money remaining in the State's "Motor Vehicle Fuel Fund," after the distribution to the counties of their proportion, is appropriated to

the "State Highway Maintenance Fund" and must be used for the "maintenance, repair, widening, resurfacing and reconstruction of the State highways and * * * of roads and highways in State parks."

In view of these provisions of our statute there can be no possible doubt that the counties and the State itself furnish special facilities in the nature of roads, highways and bridges over which the public is free to travel, in interstate commerce, or otherwise, and that the State may legally and constitutionally exact compensation therefor, without imposing any unlawful burden on interstate commerce.

The decisions of this court referred to above and many other decisions cited therein conclusively establish that the tax here in question may be exacted regardless of the fact that its imposition may affect interstate commerce to the extent of compelling such commerce to pay its own way.

Appellant's Third Contention

Appellant's third and final contention is that a Post Exchange is a department of the United States Army, performing an official function of the Federal Government.

It may be noted in passing that appellant uses the words "department of the United States Army" and does not follow the language of the statute which exempts from its operation "motor vehicle

fuel sold to the Government of the United States *or any department thereof* for official use of said government."

In support of the State's contention that a Post Exchange is not a department of the United States Government and that gasoline sold to such exchange is not a sale for the official use of the United States Government, appellee submits the following:

The establishment, maintenance and operation of Post Exchanges are provided for in *Army Regulations No. 210 65*, dated June 29, 1929, as amended by Circular No. 57 of the War Department, dated October 31, 1929.

Paragraph 1 of section I of said *Army Regulations No. 210 65* provides:

> "At each post, camp or station, the commanding officer will establish and maintain a post exchange whenever
>
> (1) There is a need for it.
>
> (2) There are organizations present that desire to participate therein.
>
> (3) The personnel is sufficient to profitably maintain and support such an exchange."

Attention is respectfully directed to (3) above. A Post Exchange will not be established unless the *personnel is sufficient to profitably maintain and support the same.*

This is equivalent to stating that the exchange must be profitably maintained and supported by the personnel of the post and is sufficient to justify the

assertion that the Government absolves itself of any liability for the maintenance and support of a Post Exchange.

(1) Post Exchanges are *Government instrumentalities.*

See

Opinion J. A. G., September 25, 1923, Dec. 2, 1929;

Dugan vs. *U. S.*, 31 Court of Claims, 456, 468.

A Government *instrumentality* is an entirely different thing from a *department* of the Government.

When we think of a "department" of the Federal Government we have in mind one of the branches into which the affairs of Government are divided. For instance, the Army, the Navy, the Treasury Department, the Department of Labor, of the Interior, etc. When we think merely of an "instrumentality" of the Federal Government, the field is much larger and we may have in mind any means by which the President or any other executive or administrative officer of the Government may perform the duties required of him, such as a commission, a bureau, or any other agency not rising to the dignity of a department.

It is to be noted that in the Army Regulations and elsewhere a Post Exchange is never spoken of or referred to as a "department" of the Government, but invariably as an "instrumentality" or "agency" of the Government. The former is a part

of the Government itself, for which the Government is directly responsible, financially and otherwise, whereas an agency or instrumentality is merely the means through which something is accomplished, and the Government may or may not be responsible therefor, financially or otherwise. It may regulate, direct, or otherwise control the functions or activities of one of its agencies or instrumentalities, without in any manner making such agency or instrumentality a part of the Government itself or rendering the Government liable therefor.

In the recent case of

Alward vs. *Johnson*, 282 U. S. 509,

Alward operated a stage line and was a carrier of the United States mails under contract with the Post Office Department. He was assessed a tax on his gross income pursuant to section 15, Article XIII of the State Constitution. His receipts were segregated as follows:

From carriage of passengers	$8,803.31
From carriage of freight	9,806.43
From carriage of U. S. mails	42,286.73

The tax representing receipts for the carriage of mail amounted to $2,114.32. In his complaint, seeking to recover the tax, Alward claimed, among other things, that in carrying the mails he acted under a contract with the Post Office Department and was an agency of the United States not subject to local taxation, and that the assessment, in so far as it was

based upon revenue received from carrying the mails, was unlawful. This court overruled every objection to the assessment and, upon the point above mentioned, said:

> "Nor do we think petitioner's property was entitled to exemption from State taxation because used in connection with the transportation of the mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely. *Railroad Co.* vs. *Peniston*, 18 Wall. 5, 30; *Metcalf & Eddy* vs. *Mitchell*, 269 U. S. 514. The facts in *Panhandle Oil Co.* vs. *Mississippi*, 277 U. S. 218, and *New Jersey Bell Tel. Co.* vs. *State Board*, 280 U. S. 338, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here."

See also

Bekins Van Lines vs. *Riley*, 280 U. S. 804.

(2) Paragraph 5 of section 1 of said Army Regulations provides:

> "An exchange (including each branch exchange) may include when desirable the following activities:
>
> (1) A well stocked general store * * * and a gasoline filling station. Sales to civilians at a filling station will be limited to civilian employees of the Post, camp or station."

(3) Paragraph 7½ added to section 1 by Circular No. 57 reads as follows:

"*Sales: to whom made.* Post or unit exchanges will sell to, or make purchases for, the following named persons and organizations only. Purchases by individuals will be limited to those required for their own use or for the use of dependent members of their families.

a. Officers, warrant officers, and enlisted men of the Army, Navy, Marine Corps, and Coast Guard, on the active or retired list.

b. Commissioned officers of the United States Public Health Service.

c. Contract surgeons.

d. Army nurses.

e. Members of the Officers' Reserve Corps and the Enlisted Reserve Corps while on active duty.

f. Officers, warrant officers, and enlisted men of the National Guard and National Guard Reserve when in Federal service.

g. Dependent members of families of persons enumerated in *a* to *f* above, during the absence of such persons and upon written authority of the post, camp or station commander.

h. Hospital matrons.

i. Civilian employees authorized for service abroad, having a status recognized by the War Department as part of an expeditionary force.

j. Civilians employed with the Army and quartered at stations so located as to make the purchases from civilian agencies impracticable, upon written authority of the post commander.

k. Honorably discharged officers, warrant officers, and enlisted men of the Army, Navy, Marine Corps, and Coast Guard in Army hospitals who are being cared for by and are

receiving medical treatment from the United States Veterans' Bureau, upon presentation of a certificate from the regional officer or medical officer under whom they are undergoing medical treatment.

l. Officers, warrant officers, and enlisted men of the National Guard and National Guard Reserve

(1) When in attendance at service schools or when attached to organizations of the Regular Army for routine practical instruction.

(2) When engaged in joint maneuvers with the Regular Army.

(3) When in camp at a station where exchanges are being operated.

m. Persons in actual attendance at Reserve Officers' Training Corps Camps and Citizens' Military Training Camps, at a station where exchanges are being operated.

n. Officers and crews of vessels of the Light house Service and light keepers and depot keepers of the Lighthouse Service.

o. Units, and the components thereof, of

(1) Army, Navy, Marine Corps, Coast Guard and United States Public Health Service.

(2) The Organized Reserves while on active duty.

(3) The National Guard and National Guard Reserve when in Federal Service or when engaged in joint maneuvers with the Regular Army or when in camp at a station where exchanges are being operated.

(4) Reserve Officers' Training Corps when in camps for such corps at stations where exchanges are being operated.

(5) Citizens' Military Training Camps when such camps are located at stations where post exchanges are being operated.

(A. G. 463.7 (8 15 29).)"

By virtue of paragraphs (g) and (k) above, it will be seen that many persons may purchase gasoline at a Post Exchange who are not employed by the Government. By virtue of paragraphs (i) and (j), it will be seen that civilian employees may likewise make such purchases. Nowhere in the Regulations is there any requirement that the gasoline so sold shall be used only upon the military reservation. It is a matter of common knowledge that all persons purchasing gasoline at a Post Exchange for use in motor vehicles use said vehicles upon the public highways of the State of California, which highways are maintained and supported at the expense of the State. Unless the distributor pays a license tax measured by the amount of gasoline sold to a Post Exchange, the purpose of the Motor Vehicle Fuel Act will be defeated, the State will lose a considerable amount of revenue and many people will be using the highways without in any manner contributing to the expense of the State for the support and maintenance thereof.

4. Subdivision (d) of paragraph 8 of section II of the Regulations provides for the distribution of profits of an exchange. When the exchange is *absolutely* free from debt a sum sufficient to pay all outstanding bills at any and all times will be

taken from the cash on hand and set aside as a reserve fund, and the remainder of the net profits of the exchange for the period specified will be disposed of by distribution to the organizations comprising the exchange and to various funds.

5. Subdivision (b) of paragraph 10 of section II reads as follows:

> "When an exchange is first established, the exchange council will fix the amount necessary for its establishment. When this amount has been determined, it will be divided by a number equal to the number of shares, the result being the value of one share. The amount to be paid by or to be charged to any company or detachment for its entrance fee or capital stock will be determined by multiplying the value of one share by a number equal to the authorized enlisted strength for the post, camp, or station of the company or detachment seeking admission."

From the foregoing it is clearly apparent that an exchange is in the nature of a private enterprise operated along the lines of an association or a corporation in which the members own certain rights represented by shares. It is also obvious that the government advances no funds and is in no way financially responsible.

6. Paragraph 48 of section VII (p. 32) reads as follows:

> "The expense of fitting up the quarters of an exchange and procuring the necessary articles

for the first stock and fixtures will be met by assessment from the funds of the several organizations which make up the membership of the exchange, or these will be contracted for, or procured on credit. When procured on credit, the bills will be paid from the first profits. *The post exchange is responsible for the debt, and not the Government.* This will be made perfectly clear to those extending credit."

The Government of the United States is responsible for the debts of its departments such as the War Department, but it will be noted that the War Department regulations specifically provide that the Post Exchange and not the Government is responsible for the debts of the exchange, and it is required that this fact shall be made perfectly clear to anyone extending credit to the exchange.

Paragraph 50 of section VII (p. 35) reads in part as follows:

> "Post exchanges being *agencies of the Government*, the duties imposed upon officers in the management of exchange affairs are as binding upon them as any other duty to which they may be assigned under competent military authority and when the property or funds of an exchange are lost through mismanagement or neglect of the exchange officer or any members of the exchange council, or both, the least that can or should be exacted in the public interests is that the exchange officer, and any members of the exchange council, responsible therefor, should make good the loss."

See Dig. Ops. J. A. G., 1912-1917, p. 474.

Attention is directed to the fact that in the above quoted paragraph Post Exchanges are designated as "agencies of the Government" which, as must be conceded, in effect denies that Post Exchanges are departments of the Government.

Nowhere in the regulations is there any intimation that supplies sold at a Post Exchange are for the official use of the Government, but it is apparent from the regulations that the contrary is true, namely, that such supplies are sold to those entitled to buy them for their individual and private use and consumption.

Subparagraph 72 of section IX (p. 38) reads in part as follows:

> "Funds of a post exchange, *although not public moneys within the meaning of Sections 3620, 3620, and 3622 of the Revised Statutes, are intrusted to officers of the Army in their official capacity, and their misapplication is punishable under the Articles of War.* When practicable, such part of them as is not required for immediate use should be deposited in a bank. For an officer in charge of a post exchange to lend its money to anyone would be a gross breach of trust."

In page 39 of the Regulations, subdivision (c), paragraph 72, section IX, it is stated that an exchange officer who cashes checks out of the exchange funds assumes the risk of loss and that the *Government is not interested in any proceedings to*

recover the money or to prosecute the drawer of the checks. Citing Dig. Ops. J. A. G., May 17, 1919.

In subdivision (d) of this paragraph it is stated that in case of loss the exchange may assert its claim against the exchange officer through whose error the loss arose, but that *no claim can be enforced against the Government.* Citing Ops. J. A. G., Oct. 4, 1919.

Revised Statutes, section 5486 above referred to (Criminal Code, section 87) relates to the unlawful use of public money by disbursing officers.

Revised Statutes, section 5490 above referred to (Criminal Code, section 80) relates to the unlawful use of public moneys by custodians.

Revised Statutes, section 5492 above referred to (Criminal Code, section 91) relates to the failure of a person, having money of the United States in his possession or under his control, to deposit it as required by law.

The following provisions of Army Regulations No. 210 65 are here quoted for the convenience of the court:

> "77a. LIABILITY OF POST EXCHANGE TO FEDERAL TAXES.
>
> Post Exchanges are not liable to the income tax imposed by section 10, war revenue act of October 3, 1917 (40 Stats. 300, 333). While they are, in a sense, associations of military organizations for business purposes, they are nevertheless government agencies or instrumentalities expressly recognized by Congress in the annual

Army appropriation acts, and they are designed to carry out a government purpose. It has never been the policy of the government to tax its own enterprises or its own manner or method of doing business. (*Dugan* vs. *United States*, 34 Ct. Cls. 458.) For the same reason neither post exchanges nor officers in charge thereof are liable for the payment of the internal revenue tax for the sale of tobacco imposed by the act of October 22, 1914 (34 Stat. 745, 752). Post exchanges are, however, subject to the stamp tax imposed by said internal revenue act (38 Stat. 763) and accordingly they are not permitted to sell articles of merchandise on which special tax stamps are required until such stamps have been affixed. A post exchange is also subject to the freight tax imposed by sections 500, 501, of the war revenue act of October 3, 1917 (40 Stat. 300, 314), since transportation service rendered to a post exchange is not service rendered to the United States within the exception contained in section 502 of said act." Ops. J. A. G., April 9, 1918.

"FLOOR TAX ON TOBACCO.

77c. Government agencies, such as post exchanges, are required to pay floor tax on tobacco under section 702 of the revenue act of February 24, 1919 (Pub. No. 254, Sixty-fifth Congress, p. 68). (See Dig. Ops. J. A. G., 1917, p. 459.) Ops. J. A. G. February 28, 1919."

"77d. INTERNAL REVENUE ON SOFT DRINKS SOLD AT GOVERNMENT AGENCIES. As the Treasury Department has ruled in a decision dated July 24, 1919, T. D. 7, I. R. 2893, p. 31, the sales of ice cream and soft

drinks sold by a municipality, post exchange, the Red Cross, or similar institutions are subject to the tax imposed by the act of February 24, 1919, 40 Stat. 1057, 1116, as the tax falls directly upon the purchaser; and this is not necessarily in conflict with the opinion of this office. Ops. J. A. G., April, 1919, p. 181. Since the Treasury Department is charged with the administration of the law its rulings should prevail until reversed by proper authority. Ops. J. A. G., Aug. 23, 1919."

"77f. STATE TAXES. Generally the exacting from the Federal Government of a State tax imposed on purchaser even if delivery takes place within the State, as distinguished from delivery on a reservation exclusively under Federal jurisdiction, is illegal, as infringing the right of the United States to exemption of its property and instrumentalities from all State taxation. (See 1 Comp. Gen. 229.) No such condition arises, however, where a State law imposes a tax on the dealer and such tax is included in the purchase price which the Government pays. (See 1 Comp. Gen. 584; 3 *ibid.* 781; 4 *ibid.* 1041; 5 *ibid.* 1022.) A post exchange is not legally liable for local or municipal taxes or licenses on the sale of commodities for the exclusive use of persons in the military service, as such exchange is an instrumentality of the Government of the United States. Ops. J. A. G., Nov. 21, 1899."

"81c. LIABILITY TO CIVIL SUIT ON CONTRACT. * * * A post exchange is a voluntary unincorpoated cooperative association of Army organizations, a kind of cooperative store,

in which all share in the benefits and all assume a position analogous to that of partners. Contracts to purchase goods entered into by the proper officers of a post exchange should be tested by the same rules of obligation which govern like agreements of individuals. In the event of an inability on the part of a post exchange to pay its debts, the organizations which participate in the Post Exchange should themselves pay off all such obligations in proportion to their respective interest in the exchange. (Ops. J. A. G., June 4, 1918.) * * * The officers of a post at which a Post Exchange is located are not liable for its debts. (Ops. J. A. G., January 7, 1911.) * * * Where a post exchange officer was required over his protest to pay out of his private funds for certain supplies ordered, furnished, and used by the Post Exchange, * * * and the exchange was dissolved, * * * recommended that the post exchange officer be reimbursed * * * by the several organizations comprising the exchange at the time the indebtedness was incurred. Ops. J. A. G., March 6, 1911; October 3, 1911."

"81f. REIMBURSEMENT FOR LOSS WHILE ATTEMPTING TO SAVE PROPERTY. As property of the regimental or Post Exchange can not be treated as property belonging to the United States, an enlisted man whose property was destroyed while he was giving attention to saving property of the exchange is not entitled to reimbursement. 25 Comp. Dec. 960."

Attention is directed to the statement contained

in paragraph 77 that Post Exchanges "are, in a sense, associations of military organizations for business purposes," and a further statement that such exchanges are subject to the stamp tax imposed by the Internal Revenue Act (38 Stats. 763), and are also subject to the freight tax imposed by sections 500 and 501, of the War Revenue Act of October 3, 1917 (40 Stats. 300, 314), since transportation service rendered to a post exchange *is not* service rendered to the United States within the exception contained in section 502 of said act. Citing Ops. J. A. G., April 9, 1918.

If a Post Exchange was a department of the Federal Government the transportation service rendered to it would be service rendered to the United States. The ruling of the Judge Advocate General that such service is not service rendered to the United States necessarily carries with it the conclusion that a Post Exchange is not a department of the Federal Government.

The tax here in question is not on the product sold but is a privilege tax imposed upon the dealer, and the tax is included in the purchase price which the Post Exchange pays. See 77f above the citations.

Surely, if the Federal Government itself imposes upon Post Exchanges internal revenue taxes, such as the stamp tax, floor tax on tobacco, tax on soft drinks and ice cream, as well as the feight tax, the government is in no position to say that a State

may not impose a franchise or privilege tax on a dealer in a certain commodity merely because that commodity is sold to a Post Exchange. Such a contention would be entirely inconsistent with the Government's own attitude toward Post Exchanges.

The case of *Panhandle Oil Co. vs. Mississippi, supra,* does not support appellant's contention here for the reason that in that case the sale was to the Coast Guard Fleet, which admittedly comes under the designation of a "Department of the Government."

Aside from *McCulloch* vs. *Maryland,* 4 Wheat 316, and *Panhandle Oil Co.* vs. *Mississippi, supra,* appellant has cited no cases in support of its contention, and since it is apparent that neither of these cases is in point we think it has been demonstrated that a Post Exchange is not a department of the Federal Government, and that a sale to it is not for the official use of the Government, and that, therefore, the distributor is not exempt from the tax by reason of such sale.

Although the following cases are not precisely in point, since they involved Federal and State income tax laws, nevertheless, they have a bearing here upon the question of interference with or imposition upon Federal instrumentality by reason of State taxing laws:

Flint vs. *Stone Tracy Co.,* 220 U. S. 107;
Willcuts vs. *Bunn,* 282 U. S. 216;
Educational Films Corp. vs. *Ward,* 282 U. S.; 379;

Denman vs. *Clayton*, 282 U. S. 514;
Metcalf & Eddy vs. *Mitchell*, 269 U. S. 514.

Likewise, the following cases, involving a different kind of tax:

Cornell vs. *Coyne*, 192 U. S. 418;
Lash's Products Co. vs. *U. S.*, 278 U. S. 175;
Wheeler Lumber Co. vs. *U. S.*, 281 U. S. 572;
Indian Motorcycle Co. vs. *U. S.*, 51 Sup. Ct. Rep. 601.

Let it here be noted that in the *Panhandle Oil* case Justices Holmes, Brandeis, Stone and McReynolds dissented, and in our opinion the grounds of dissent show that the majority opinion departed from principles long before established by decisions of this court and still adhered to, in spite of the *Panhandle* case. Note the words of Mr. Justice Stone in his dissenting opinion in the *Motorcycle* case:

> "These considerations are, to me, persuasive that the broad rule announced in the Panhandle Oil case ought not to be extended, *even if we were not required by our own decisions to limit it;* and that we ought not to strain the words of the statute to bring this case within the authority of that one." (Italics ours.)

Again we find that in the *Motorcycle* case Justices Stone and Brandeis dissented and Mr. Justice Holmes acquiesced in the decision only upon the ground that the *Panhandle Oil* case (in which he had dissented) was controlling. In other words,

he also dissented in the *Motorcycle* case. The dissenting opinion of Mr. Justice Stone in the *Motorcycle* case is most instructive and illuminating, particularly as to the extent to which the *Panhandle Oil* case has already been modified or limited.

He points out that the court has never attempted to state the reason for the distinction made between the *Panhandle* case and cases involving a tax on legacies to the United States or to a State (*U. S.* vs. *Perkins*, 163 U. S. 625; *Snyder* vs. *Bettman*, 190 U. S. 249; *Greiner* vs. *Lewellyn*, 258 U. S. 384), although the consequent indirect burden is apparent, and he also points to the *Educational Films Company* case and that of *Willcuts* vs. *Bunn* to show the court's more recent opinion that an excise tax, imposed directly on the individual, is *not* invalid because indirectly it may burden either the State or the National Government.

We believe the *Panhandle* case is not in point here for the reasons already stated herein, and for the further reason that under our statutes, where the motor fuel is not used in motor cars on the highways of the State, the tax paid may be recovered by the consumer. Another distinction is that the United States is empowered by the Constitution to maintain and operate the Coast Guard Fleet and the Veterans' Hospital, and the right of the United States to make purchases therefor is derived from the Constitution (*Panhandle Oil* case), while Post Exchanges are merely instru-

mentalities established under army regulations which have received the approval of the Congress.

The *Panhandle Oil* case can not be considered as authority here for the further reason that in that case no question of resale of the gasoline was involved. For all that appears from the record the gasoline purchased by the Government for the use of the Coast Guard Fleet and the Veterans' Hospital was used by those departments of the Government, and such use constituted "official use" by "departments of the Federal Government." Even if we assumed in this case that the Post Exchange was a "department of the Federal Government" and that it used some of the gasoline purchased by it "for official use," and could therefore obtain a refund of the tax paid thereon, it does not follow that gasoline *resold* by it and thereafter *used on the public highways of the State* is either exempt from the tax, or that the purchasers of the same would be entitled to a refund of the amount representing the tax. The contrary is obviously the case. Since the *Panhandle Oil* case involved no such resale, or in fact any resale at all, it is clearly not in point here. The same reasoning further distinguishes the *Indian Motorcycle* case, for there also there was no resale by the municipality, but a use by it for its own Governmental purposes.

There is a still further distinction to be drawn here to which reference has not hitherto been made.

It must be conceded that the Government of the United States, in supervising and controlling, in a sense, the activities of Post Exchanges, does not become responsible, financially or otherwise, for such exchanges. In reality, these exchanges are private enterprises sanctioned by the Government and operated under its supervision, the profits being distributed to the component units, and the losses, if any, being shared by them, and to this extent the Government is engaging in a private enterprise, and not in its ordinary function as a Government.

That being so, the situation is analagous to that in the case of

South Carolina vs. *United States*, 199 U. S. 437.

South Carolina prohibited the sale of liquor and established dispensaries operated by persons who had no pecuniary interest therein. Sections 3232 and 3244 of the U. S. Revised Statutes provided that no person should engage in the business of selling distilled spirits without paying a special tax therefor.

The United States demanded this special tax from each dispenser and the tax was paid by the State under protest and suit was brought to recover the amount so paid.

Among other things, it was held by the Supreme Court that a State may control the sale of liquor by the dispensary system, but when it does so, it engages in ordinary private business, which is not, by the mere fact that it is being conducted by the

State, exempted from the operation of the taxing power of the National Government. Under many authorities, some of which are cited herein, the converse of the foregoing is equally well established: We think that although the Government derives no pecuniary profit from the operation of Post Exchanges, nevertheless, it has a sort of paternal interest therein and to the extent that the personnel employed by the Government profit thereby, the Government also profits. So we believe the Government can not avoid the necessary result of its activities in this respect, nor can it hide behind the contention that in engaging in such activities it is engaging in the ordinary functions of the Government of the United States.

Consider for a moment to what extent the Government might go if its present contention be sustained:

The regulations, as previously pointed out, limit sales at Post Exchanges to certain designated persons or classes, including civilian employees. As to all of them it is claimed the tax in question is not payable. Upon that theory the regulations might be changed to embrace other persons and classes, including, so far as we can see, any person in the State of California. What would be the result? No gasoline would be sold except in Post Exchanges; no revenue would accrue to the State; no funds would be provided for construction of new highways or bridges, or for the maintenance or repair of those

now in existence; commerce over the highways, both interstate and intrastate, would be free and traffic would be uncontrolled; confusion would soon become chaos; accidents attended by injuries and death would multiply, and eventually by the terrific strain on the highways they would become impaired, dangerous and finally impassable.

We concede readily that the foregoing is an extreme example not to be considered as at all probable. But to say that it is not probable is to admit that it is possible. An inch once conceded will, in time, be stretched to a foot, and so on. The United States Government is jealous of its taxing powers and of its revenues derived therefrom, and it behooves the State to be no less jealous of its prerogatives, especially where the benefits derived from a particular tax are seen to extend equally to all who wish to avail themselves of such benefits. It has not been pointed out in any of the briefs filed on behalf of appellant why a comparatively large number of persons should enjoy the use and benefits of California's highways without contributing alike with other residents of the State to their construction, maintenance, repair and regulation through traffic control.

The road signs, the traffic lanes of white and yellow lines, the motorcycle officers, all contribute to the safety and comfort of the passenger in motor vehicles, and enable him to pass rapidly from place to place within the State and to points beyond its

borders, and the cost thereof, while considerable, is of no comparison with the cost of constructing, maintaining and repairing these avenues of travel. As we have pointed out, the State provides these facilities from the revenues arising from this tax and does not otherwise profit thereby, and it can not be said that the Government of the State is engaged in any sense in a private enterprise.

Assuming for the sake of argument that a Post Exchange is an instrumentality of the Government which *may be* protected from State taxation, it is not so protected unless Congress has so provided. This is so even though the tax had been levied directly against the instrumentality, and not, as here, levied upon the distributor of a commodity sold to the exchange

(a) *Shaw* vs. *Gibson Zahniser Oil Corp.*, 276 U. S. 575;

(b) *Gondy* vs. *Meath*, 203 U. S. 146;

(c) *Gromer* vs. *Standard Dredging Co.*, 224 U. S. 362;

(d) *Fidelity & Deposit Co.* vs. *Philadelphia*, 240 U. S. 319;

(e) *Railroad Co.* vs. *Peniston*, 18 Wall. 5;

(f) *Choctaw O. & G. R. R. Co.* vs. *Mackey*, 256 U. S. 531;

(g) *Central Pacific R. R. Co.* vs. *California*, 162 U. S. 91.

In (a) above, a State tax was imposed on those engaged in the production of oil and gas equal to

three per cent of the gross value less the royalty interest. The land had been purchased by a full blood Indian with trust funds, under the supervision of the Secretary of the Interior. The land was leased to the oil company and it objected to the gross production tax on the ground that it constituted a tax on a Federal instrumentality.

The court held the tax was valid, although it said that

> "* * * in a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the State in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. * * * There are some instrumentalities which, though Congress may protect them from State taxation, will nevertheless be subject to that taxation unless Congress speaks." (Citing the cases above mentioned.)

In (b) above, the question was whether lands belonging to a Puyallup Indian, acquired by him under a treaty of March 16, 1854 (10 Stats. 1043) were subjected to State taxation.

It was held that no exemption of such land existed by implication, but that exemption must be clearly manifested. Since no exemption was to be found in any act of Congress it was held that the lands were subject to State taxation.

In (c) above the question was whether property

of a Delaware corporation situated in the harbor of San Juan, Porto Rico, and used exclusively in dredging operations pursuant to contract with the United States, was subject to the taxing power of Porto Rico. The court held that it was and that the contention that the property was an instrument of the National Government and therefore not subject to local taxation could not prevail.

In (d) above the tax was a State tax imposed upon premiums received by a surety company upon surety bonds required by the United States. It was claimed that such an exaction burdened the operations of the Federal Government and that the surety company was a Federal instrumentality and could not be subjected to such a privilege tax.

It was held that the company's right to do business in the State depended upon compliance with its laws and that mere contracts between private corporations and the United States do not necessarily render the former essential Government agencies and confer freedom from State control. The tax was upheld.

(e) above is quoted from in (g) *infra*.

In (f) above it was held that a railroad right of way and station grounds constituting, with the consent of Congress, parts of a through line of an extensive interstate system, are not exempt from State special tax assessments upon the ground that they are parts of a Federal instrumentality, though originally granted by Congress with a purpose to

develop coal lands of the Choctaw Nation, and though coal mines leased from the tribe are served by the railroad.

In the course of its opinion the court said:

> "The mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from State taxation. * * * And even though it be granted that the Federal Government utilized the railroad as an instrument in working out its policy toward the Indians the tax upon the railroad property would be none the less valid." (Citing cases.)

In (g) above, it was held, following *Railroad Co.* vs. *Peniston*, 18 Wall. 5, that even in respect of railway corporations created by act of Congress, the claim of exemption of their property from State taxation has been repeatedly denied.

Quoting from

Railroad Co. vs. *Peniston, supra,*

the court said:

> "It can not be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the State all power to tax persons or property. * * * It is therefore manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, *or upon the fact that they are agents* (italics ours), but

upon the effect of the tax, that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers. * * * No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It can not be so used, indeed, as to defeat or hinder the operations of the National Government, but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

See, also,

Pullman Co. vs. *Richardson,* 185 Cal. 484; affirmed, 261 U. S. 330;
A. T. & S. F. R. Co. vs. *Collins,* 294 Fed. 742;
Payne vs. *Richardson,* 189 Cal. 103.

Although the foregoing cases are in point here, they are not so important as the case of

Keane vs. *United States,* 272 Fed. 577.

In that case the exact point here under consideration was decided by the Circuit Court of Appeals,

Fourth Circuit, State of Virginia, on February 2, 1921.

The question was whether a military Post Exchange was such a "department of the Government" that proof of a conspiracy to defraud it would sustain an indictment under Criminal Code, section 37 (Comp. Stats., Sec. 10201), which reads as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The court considered the manner or method of establishing Post Exchanges and then said:

> "In this connection it may be mentioned that these Post Exchanges are such purely private organizations for the convenience and pleasure of the soldiers themselves that they have been required to pay floor taxes on tobacco under section 702 of the Revenue Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, Par. 6204*d*). The Judge Advocate General's Office, a branch of the War Department, held that these exchanges were subject to floor taxes on tobacco. See Opinions of the Judge Advocate General, 3313, February 28, 1919. We find in the opinion of the Judge Advocate General, No. 158, Janu-

ary 4, 1918, the following illuminating, yet brief, definition of a Post Exchange, to wit:

"'A Post Exchange is a voluntary, unincorporated cooperative association of army organizations a kind of cooperative store in which all share the benefits and all assume a position analogous to that of partners. Contracts to purchase goods entered into by the proper officers of a Post Exchange should be tested by the same rules of obligation which govern like agreements of individuals. In the event of an inability on the part of a Post Exchange to pay its debts, the organizations which participate in the Post Exchange should themselves pay off all such obligations in proportion to their respective interests in the exchange.'" (Pages 581 2.)

"The question here is not whether a Post Exchange is useful and pleasurable to soldiers, and therefore to the army, but the question we must decide is whether or not a Post Exchange is such a lawful department of the Government as to bring it within the protection of section 37 of the Criminal Code. If the transaction alleged in the indictment in this case is covered by this section of the Criminal Code, then every transaction with a purchaser, representing a Post Exchange, of baseballs and baseball supplies, of cricket clubs, of golf balls and sticks, and even of playing cards, would be, in case of conspiracy to defraud such organization, subject to the pains and penalties of this drastic criminal section." (Page 583.)

"It is not every organization authorized to be formed by Congress that is such a lawful department of the government within the contempla-

tion of this criminal statute. If the contrary were true, then it would be a criminal offense to conspire to defraud every corporation or organization authorized to be established by Congress. This would include dealing with the Young Men's Christian Association, the American Red Cross, the National Educational Association, the American Boy Scouts, and numbers of other organizations which have been authorized and incorporated by Congress. Congress, by the act of May 31, 1902 (Comp. St., Par. 1989), expressly gave the Secretary of War power to grant permission to the International Committee of the Young Men's Christian Association of North America to erect and maintain in the military reservations within the United States on its foreign possessions such buildings as their work for the promotion of the social, physical, intellectual, and moral welfare of the garrison may require under such regulations as the Secretary of War may impose. Here is a direct warrant from Congress for the operation of these Christian Associations, and tacit inference that they are necessary for the physical, intellectual, and moral welfare of the soldiers; and yet it will not be argued that this organization is such a 'lawful department' of government, subjecting persons who deal with its representatives to the pains and penalties of section 37 of the Criminal Code." (Page 587.)

"Clearly the post exchange described in the indictment in this case is not such a lawful department of government. Therefore this Post Exchange is not such an institution as that a fraud upon the United States can arise from or

be involved in any transaction concerning it, and section 37 of the Criminal Code does not apply to transactions with such organization." (Pages 587 8.)

It is apparent that the Government acquiesced in the decision in the *Keane* case for we find nothing to indicate an appeal therefrom.

The decision of the court is so obviously sound that it is not surprising that the Government accepted it.

In the case of

Thirty-first Infantry Post Exchange vs. *Juan Posadas, Jr.*, 54 Philippine Reports, 866,

decided on September 4, 1930 (petition for writ of *certiorari* denied by U. S. Supreme Court on April 20, 1931), the question involved was whether the Philippine Government could impose a sales tax on merchants selling goods to an Army Post Exchange.

The Supreme Court of the Philippine Islands, in a well-considered opinion, held:

1. That "whenever the National Government permits an organization under its control to engage in a business which is of a private nature, that business is not withdrawn from the taxing power of the State. *South Carolina* vs. *U. S.*, (1905), 199 U. S. 437."

2. That "only those agencies through which the Federal Government immediately and directly ex-

erciscs its sovereign powers are immune from the taxing power of the States. * * * The effect of the tax upon the functions of the Government and the nature of the governmental agency determine finally the extent of the exemption. *Metcalf* vs. *Mitchell* (1926), 269 U. S. 514; *Thomson* vs. *Union Pac. Ry. Co.* (1869), 9 Wall. 595."

3. That the case of *Panhandle Oil Co.* vs. *Mississippi*, 277 U. S. 218, is not controlling. "There the right of the United States to make purchases was derived from the United States Constitution; here, the right of the Army Post Exchange to make purchases is derived from Army regulations and Army practice. There the sale was made to instrumentalities authorized by the Constitution, which consumed the merchandise; here, the sales were made to Army Post Exchanges not so constitutionally authorized, which merely acted as intermediaries. There it must be taken for granted that the Coast Guard Fleet and the Veterans' Hospital were constructed and operated by Government funds; here, except that buildings are provided by the United States Government for the Army Post Exchanges, the latter are not so constituted and operated."

4. That "the majority decision in the *Panhandle Oil* case carries the Marshallian theory of national supremacy just about to its extreme limits. We do not think that the present case falls within those limits. When a merchant sells a case of hair pins

to an Army Post Exchange, and the wife of an army officer purchases a package of those hair pins, and when a merchant sells a quantity of tobacco to an Army Post Exchange, and a soldier provides himself with his tobacco; and when the merchants who perfect the sales made good the required taxes, 'the exertion of national power' is not so burdened or interfered with, and 'the exactions demanded' do not so infringe the constitutional independence of the United States as to exempt the sales from taxation, which every one else, including the merchant who sells to the Philippine Government, must pay. That is our understanding of the authorities of the law.

"There can exist no measure of doubt that the basic rule, together with its qualifications, applies not only to the States of the American Union, but also to unincorporated territories with the status of the Government of the Philippine Islands.

"Placing some emphasis on the point of long acquiescence in the imposition of the sales tax on vendors of merchandise to Army Post Exchanges; on the point that the Congress of the United States has virtually sanctioned such a sales tax by confirming Philippine revenue laws without reservation; and on the point that a kind of cooperative store in the Army is akin to a private business enterprise which is not withdrawn from taxation, we desire with more emphasis to indicate the lack of standing of the plaintiffs to contest the tax. On

still broader grounds, we would consider the effects of the sales tax upon the United States Army, and the nature of an Army Post Exchange. The tax laid upon Philippine merchants who sell to Army Post Exchanges does not interfere with the supremacy of the United States Government, or with the operations of its instrumentality, the United States Army, to such an extent or in such a manner as to render the tax illegal. The tax does not deprive the Army of the power to serve the Government as it was intended to serve it, or hinder the efficient exercise of its power.

"We rule that an Army Post Exchange, although an agency within the United States Army, can not secure exemption from taxation for merchants who make sales to the Post Exchange. The question must, therefore, be answered in the affirmative. The plaintiffs have not made out a case."

As stated above, application was made to the Supreme Court of the United States for a writ of *certiorari* and the writ was denied on April 20, 1931. (51 Sup. Ct. Rep. 487.)

The most recent decision on this point is found in the case of *Pan American Petroleum Corporation* vs. *State of Alabama*, ____ Fed. (2d) ____, decided by the United States Circuit Court of Appeals for the Fifth Circuit, on November 15, 1933.

The statement of the issues involved is quoted from the opinion of the court as follows:

"This is a suit by the State of Alabama to collect excise taxes upon the sales of gasoline and other petroleum products by the Pan American Petroleum Corporation to post exchanges at Camp McClellan and Maxwell Field, located in Alabama but situated on United States Government reservations. These petroleum products were shipped into Alabama from other States, stored by the Pan American in bulk plants at Anniston and Montgomery, Alabama, and afterwards sold therefrom by it and delivered to the post exchanges. We need consider only the tax in respect of sales of gasoline, for it is admitted that if it is collectible, the tax on sales of the other petroleum products is likewise collectible. The suit was defended upon the grounds, among others, (1) that the tax did not accrue because the gasoline was sold for use at post exchanges on military reservations, the idea being that they are not in the State of Alabama; and (2) that a post exchange is a department of the United States Government, and therefore sales made to it are exempt from the tax. Other grounds of objection to the tax were also urged, but in the view we take of the case it is unnecessary to consider them. The case was tried upon an agreed statement of facts before the district judge, who gave judgment for the State; and the defendant appeals."

Inasmuch as the Alabama statute provided for the imposition of the tax "upon selling, distributing or *withdrawing from storage* for any use gasoline as herein defined in this State," the court held that it was unnecessary to decide whether the situs of a

military reservation after cession to the United States is inside or outside the State.

But upon the question whether a Post Exchange is a department or instrumentality of the Federal Government the court said:

> "It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to the United States, either directly, or indirectly through one of its departments, for Government use. *Panhandle Oil Co.* vs. *Mississippi*, 277 U. S. 218. There a sale of gasoline was made direct to the United States for the use of the Coast Guard and a Government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the Government, for then also the United States would have been the real purchaser. But the tax here is not on the sale but is on the withdrawal of the gasoline. Furthermore a Post Exchange is of course not the Government; nor is it a department or instrumentality thereof. On the contrary, a Post Exchange is a voluntary, unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The Government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the Post Exchanges at Camp McClellan

and Maxwell Field are not exempt from the State excise taxes."

The Supreme Court of California, in disposing of this point, said:

"But it seems to us that a well founded distinction may be found between the sales there involved (Panhandle Oil case) and sales to an army Post Exchange. The commanding officer of an army post is not required to organize the Post Exchange unless there is need for it unless the units present desire to participate therein or unless the personnel is sufficient to profitably maintain and support such an institution. In other words, a Post Exchange is at most but a Government agency, designed to operate for the welfare of the troops such activities as a general store, meat or vegetable market or gasoline station, or a restaurant, gymnasium, recreation room, library or theater. Thus it is not properly described by the word 'department' of the Government in its activities. It is largely a cooperative institution, intended to supply the needs and promote the moral and civic betterment of the troops at the post.

"It is supervised by an exchange council, composed of the commanding officers of the respective units represented in the organization. The funds of the Exchange are not public moneys within the meaning of the Revised Statutes (Rev. Stats., Sec. 5488, 90, 92). The Exchange

is not instituted by the aid of funds from the United States nor are its avails paid into the treasury. It is a voluntary, unincorporated, co-operative association in which all units share the benefits and all assume a position analogous to that of partners. In the event of the inability of the Post Exchange to pay its debts, the organizations which participate in it are supposed themselves to pay off all such obligations in proportion to their respective interests in the Exchange. Neither the Government nor the officers of the post wherein the Exchange is located are liable for its debts. The property of the Post Exchange is not to be treated as property belonging to the United States. The Exchange itself is liable for certain Federal taxes, such as the stamp tax imposed by the Internal Revenue Act, the freight tax imposed by the War Revenue Act of 1917, a floor tax on tobacco under the Revenue Act of 1919, Sec. 702; sales of ice cream and soft drinks by a Post Exchange are subject to tax under the same act. From these and other observations that might be made, touching the nature of the organization of an army Post Exchange, we are of the opinion that it is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the State wherein it is located and that it is not one of those agencies through which the Federal Government exercises its constitutional or sovereign power."

We find, therefore, that in respect to appellant's third contention, the decision in every case wherein

that contention was involved has been against appellant.

These cases are:

Keane vs. *United States*, 272 Fed. 577;

Thirty first Infantry Post Exchange vs. *Posadas*, 54 Philippine Reports, 866;

People vs. *Standard Oil Co.*, 85 Cal. Dec. 550, 22 Pac. (2d) 2;

Pan American Petroleum Corporation vs. *State of Alabama*, Fed. (2d)

The importance to the State of California of a decision of this court upholding the validity of the tax in question is not indicated by the amount involved here. However, the court may well infer the fact to be, as indeed it is, that large revenues of the State are involved, as is true in other States which are anxiously awaiting the outcome of this case. Not only that, but there is a principle involved, a matter of State sovereignty, which is of vital importance.

In the very recent case of

Gregg Dyeing Co. vs. *Query*, 52 Sup. Ct. Rep. 631; decided May 31, 1932,

this court has definitely stated that in maintaining rights asserted under the Federal Constitution the decision of the court is not dependent upon the form of a taxing scheme or upon the characterization of it by a State court; that the court regards the

substance rather than the form, and that the controlling test is found in the operation and effect of the statute as applied and enforced by the State.

The State court in that case had held that the burden of the tax in question actually rested upon the consumer although not directly placed upon him, and this court said that it found no reason to challenge that view.

In the case of our statute, the Supreme Court of California held in

People vs. *Ventura Refining Co.*, 204 Cal. 286,

that the clear intent of the law was to levy an excise or occupation tax upon the distributor, but permitting the distributor to indemnify itself by adding the amount of the tax to the selling price so that the ultimate effect of the tax falls upon the consumer who indirectly pays it.

That this court will adopt and follow this construction of our statute is apparently made clear and certain by what was said in the *Gregg Dyeing Company* case.

Judging by the decision in that case it seems clear that this court in the case at bar will consider the operation and effect of the Statute and will hold that the effect is to impose the tax upon the ultimate consumer of gasoline and not upon the United States or any of its departments, agencies or instrumentalities, and will further hold that the imposition of the tax under the facts of this case does not interfere with the exclusive jurisdiction of the

United States over the Presidio of San Francisco or burden the Government in any manner or form whatsoever, but that the tax is, in effect, a just and reasonable charge for the use of State highways and other facilities furnished to the motoring public by the State, and that as such the tax in question is valid and the statute imposing it is free from constitutional or other objections.

We submit, therefore, that the judgment of the Supreme Court of California herein appealed from should be affirmed.

U. S. WEBB,
Attorney General of California,

H. H. LINNEY,
Deputy Attorney General,
Attorneys for Appellee.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1933.

No. 347.

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of California, appellee herein, respectfully petitions this honorable court to grant a rehearing of the above entitled cause.

GROUNDS FOR REHEARING

The decision of this court announced on February 5, 1934, proceeds upon the theory that by the act of March 2, 1897 (Statutes 1897, p. 61), California ceded to the United States exclusive jurisdiction over the Presidio of San Francisco, and "reserved to herself no power whatever in respect of taxation."

This court, in deciding this case against appellee, said:

> "Appellant challenges the validity of the taxing act as construed by the Supreme Court. The argument is that since the State granted to the United States exclusive legislative jurisdiction over the Presidio, she is now without power to impose taxes in respect of sales and deliveries made therein. This claim, we think, is well-founded; and the judgment below must be reversed."

And in support of its conclusion the court referred to the following cases:

Arlington Hotel Company vs. *Fant,* 278 U. S. 439;

United States vs. *Unzueta,* 281 U. S. 138;

Surplus Trading Co. vs. *Cook,* 281 U. S. 647.

What was entirely overlooked in presenting this case to the court was this:

That section 6 of Article XIII of the Constitution of California of 1879, in effect when the act of

cession was adopted in 1897, and still in effect, reads as follows:

> "The power of taxation shall never be surrendered or suspended by any grant or contract to which the state shall be a party."

This provision of the Constitution prevented the Legislature from passing any act, the effect of which would be to deprive the State of the right to impose *taxes* in respect of sales and deliveries of merchandise within the Presidio.

It must of necessity follow, therefore, that this court was in error in stating:

> "Considering these opinions, it seems plain that by the Act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio—put that area beyond the field of operation of her laws. Accordingly, her Legislature could not lay a tax upon transactions begun and concluded therein."

In view of the provision of the Constitution above referred to the act of the Legislature could not have the effect of surrendering or suspending the State's jurisdiction within her exterior boundaries in matters of taxation.

There is no paramount law of the United States which operates of itself to cause the suspension or surrender by the State of her jurisdiction in respect to taxation.

Fort Leavenworth Ry. Co. vs. *Lowe,* 114 U. S. 525.

In the case just cited a reservation in the act of cession relative to taxation of certain property on a military reservation was given full effect. That such reservation of power is contained in the Constitution of a State rather than in a legislative act of cession of jurisdiction can not change the result—the reservation of power in respect to taxation is binding in either event.

It has never been suggested that the application of the Motor Vehicle Fuel Act of California to sales and deliveries of gasoline to the Post Exchange would interfere with the use of the Presidio as a military post. It would be impossible, in our opinion, to prove that such application of the statute would or could have that result.

In view of section 6 of Article XIII of the Constitution of California it seems apparent that the decision of this court in this cause was based upon an incorrect premise, namely, that the Legislature had, by the act of 1897, surrendered the State's power of taxation in respect to the Presidio.

When the true fact is brought to the attention of the court, namely, that the Constitution of the State expressly prohibited the Legislature from making such a surrender of power, and that its attempt to do so was, therefore, necessarily void, a situation is presented where we believe this court

should grant a rehearing to the end that complete justice may be done in this cause.

Our responsibility for failure to bring to the attention of the court the provisions of section 6 of Article XIII of the Constitution is recognized and we regret that this omission occurred, but our duty to the State and to this court compels us to take all proper and necessary steps to obviate the error in the interests of justice and to the end that the law be correctly stated as applied to the true facts.

In the light of the foregoing we respectfully request that our petition for rehearing be granted.

Respectfully submitted.

U. S. WEBB,
Attorney General of the State of California,

H. H. LINNEY,
Deputy Attorney General,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I, U. S. Webb, Attorney General of the State of California, and counsel for said State herein, hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and is not presented for delay.

U. S. WEBB,
Attorney General
of California.

O

22

FILE COPY

Office Supreme Court, U.
FILED
FEB 27 1934
CHARLES ELMORE CROP
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 347

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

APPELLANT'S REPLY TO RESPONDENT'S PETITION FOR A REHEARING.

OSCAR SUTRO,
FELIX T. SMITH,
VINCENT K. BUTLER, JR.,
Standard Oil Building, San Francisco,
Attorneys for Appellant.

BARNAR WALSH PRINTING CO., SAN FRANCISCO

In the Supreme Court
OF THE
United States

October Term, 1933

No. 347

Standard Oil Company of California,
Appellant,

vs.

The People of the State of California,
Respondent.

APPELLANT'S REPLY TO RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

In his petition for rehearing the Attorney General of California suggests for the first time that since the California constitution prohibits the surrender of the state's power of taxation by any grant or contract to which the state is a party, the legislative act of cession by which

the state gave to the United States exclusive jurisdiction over the Presidio cannot deprive the state of the power to impose a tax within the Presidio.

While the point is raised in this case at the eleventh hour, it is not a new one. In *Yellowstone Park Transportation Company v. Gallatin County, et al.*, 31 F. (2d) 644, the Circuit Court of Appeals for the Ninth Circuit, opinion by Judge Rudkin, held that a contention similar to that now made by petitioner was without merit, and this court declined to review the decision (280 U. S. 555). Montana had ceded to the United States exclusive jurisdiction over the lands within the state embraced within Yellowstone National Park. The act of cession was unqualified, except, as in the California act, for the reservation of the right to serve and execute civil and criminal process. County taxing officers in Montana sought to impose a tax on personal property within the park belonging to the plaintiff corporation. The contention was made that the act of cession violated the provision of the Montana state constitution declaring that the power to tax corporations or corporate property shall never be relinquished or suspended. The Circuit Court of Appeals said:

> "This contention is without merit. If exclusive jurisdiction over that portion of the park in the state of Montana was lawfully ceded to the United States, the cession inured to the benefit of both corporations and individuals, and the power to tax property in the ceded territory, whether corporate or individual, was at an end . . ."

The decision was based upon the ruling of this court in *Arlington Hotel Co. v. Fant*, 278 U. S. 439, a case

which has since been followed by *Surplus Trading Company v. Cook*, 281 U. S. 138, cited with the *Arlington Hotel Co.* case in the opinion of the court here. The *Surplus Trading Company* case came up from Arkansas. The constitution of that state contains a provision against surrender of state taxing power similar to that in the Montana constitution, but despite the state constitutional prohibition, this court refused to sustain the local tax or to qualify in any way the comprehensive nature of the state cession of exclusive jurisdiction.

The point now raised must, therefore, be dismissed as already having been decided against petitioner in the cases cited by this court in its opinion in this case. There is no material difference for our present purpose between the provisions of the Montana and Arkansas constitutions and that of the California constitution. The former, relating to taxes on corporations and corporate property, are specific and the corresponding provision in the California constitution is general, but the principle is the same. If the specific provision on corporations was found to be inapplicable to the corporation plaintiffs in the *Yellowstone National Park* case and the *Surplus Trading Company* case, there is stronger reason for finding that the California provision has no application here. It may be noted that in the convention which drafted the present California constitution the matter now appearing in Article XIII, Section 6, was originally submitted in the same form as the provisions of the Montana and Arkansas constitutions (Debates of Constitutional Convention, Vol I, pp. 101, 119, 177).

The provision in the California constitution, to which petitioner refers, and similar provisions in other state constitutions, are not designed to interfere with or restrict surrender by a state to federal authority of its jurisdiction for all purposes. They are intended to prevent the creation by a state legislature of a privileged or preferential class of taxpayers.

In *Commonwealth v. United Cigarette Machinery Co.*, 120 Va. 835, 92 S. E. 901, the court said, in commenting upon this form of constitutional provision:

> "It is manifest . . . that the prohibition in question was intended to prevent the extension of favors and discriminations in favor of corporations as against individuals."

The purpose of these provisions is clearly to prevent discriminatory applications of the taxing power as such, and not to forbid a cession of complete jurisdiction, to which the surrender of the taxing power is simply an incident. In the case of cession to the federal government for national defense, there can be no suggestion of special legislation or private advantage.

Furthermore, the constitution of the United States is paramount. Article I, Section 8, Cl. 17, provides that Congress shall have power

> "to exercise exclusive legislation . . . over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

The Presidio is a military reservation. The California legislature has given its consent that the United States

shall have exclusive jurisdiction over all property within the state used by the United States for military purposes.

The act of cession (Stats. California 1897, p. 51) is explicit and unqualified. It is irrevocable, the federal constitutional provision becomes operative, and the ceded territory has become as much without the jurisdiction of the state as any other foreign territory, except in so far as jurisdiction was *expressly* reserved. As just shown, the conventional provision affecting process was not such a reservation, and was not intended as such.

The force of our contention is fully recognized in *Fort Leavenworth Railroad Company v. Lowe*, 114 U. S. 525, the only case cited by the Attorney General in his petition. In that case there was an *express* reservation in the act of cession, of the right to tax privately owned railway property within the territory ceded, and this court gave effect to the reservation. In doing so, however, it stated the general rule when there is no reservation, and the effect of the federal constitutional provision as follows:

> "When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals, and of the Attorneys General."

An analogy may be suggested to show the weakness of petitioner's present position. The legislature has no power to surrender or suspend the police power of the state. Will the Attorney General contend that on this account, and despite the act of cession, state authorities have the right to enforce general state police measures within the Presidio?

During all the time in which this case has been argued and briefed, in the trial court, in the state supreme court, and in this court, no intimation was ever made that the state constitutional provision, cited in the petition for rehearing, had any bearing on the case.

Even though this court were now to consider the point, it must be found to be without merit and determined against petitioner in previous rulings of this court.

We respectfully submit that the petition for rehearing should be denied.

Dated, San Francisco,
February 23, 1934.

OSCAR SUTRO,
FELIX T. SMITH,
VINCENT K. BUTLER, JR.,
Attorneys for Appellant.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of February, 1934.*

_____

Attorney General of the State of California,

_____

Deputy Attorney General of the State of California,

Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 347.—October Term, 1933.

Standard Oil Company of California, Appellant, *vs.* The People of the State of California. } Appeal from the Supreme Court of the State of California.

[February 5, 1934.]

Mr. Justice McReynolds delivered the opinion of the Court.

By Ch. 267, Statutes 1923, as amended (Chs. 716 and 795, Statutes 1927), the State of California undertook to lay a license tax upon every distributor for each gallon of motor vehicle fuel "sold and delivered by him in this State" with certain exceptions not here important.

At its own expense and risk, appellant, a Delaware corporation, qualified to do business in California, sold and delivered to the Post Exchange, within the Presidio of San Francisco, 420 gallons of gasoline. It carried this to the Exchange's place of business in barrels or by tank trucks. Both sale and delivery were within the area long held and occupied by the United States for military purposes.

The State demanded of appellant three cents per gallon upon the gasoline so sold and delivered. Payment being refused, this suit followed. In the trial court the Company prevailed. The Supreme Court held to the contrary and, among other things, said—

> "We have thus presented the question whether sales and deliveries of gasoline at a military reservation under the sole jurisdiction of the United States, made to the Army Post Exchange therein, are to be excluded in fixing the license fees to be paid by the distributor under said act of the legislature. . . . It is at once conceded, as already implied, that the military reservation in question is territory over which the United States exercises sole legislative authority. . . . It is contended that by reason of this concession, a sale consummated on it is a sale outside the state, as tho consummated in Nevada or

Oregon. It is our conclusion that the manifest intention of the act was to include all sales completed within the geographical confines of the state and for this purpose said military reservation was to be included like all other territory."

The Presidio of San Francisco, a tract of more than fourteen hundred acres, lies between that city and the Golden Gate, and is within the exterior limits of California. Established as a military post under Spanish dominion about 1776 it continued to be so used by the Republic of Mexico until ceded to the United States in 1848 by the treaty of Guadalupe Hidalgo. An executive order of November 6, 1850, dedicated it to public purposes; since then it has been occupied as a military reservation. By act of March 2, 1897, California ceded to the United States exclusive jurisdiction over this area with a proviso—"That this state reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this state against any person or persons charged with crimes committed without said lands." See *United States* v. *Watkins*, 22 F. (2d) 437. The State reserved to herself no power whatever in respect of taxation.

Appellant challenges the validity of the taxing act as construed by the Supreme Court. The argument is that since the State granted to the United States exclusive legislative jurisdiction over the Presidio, she is now without power to impose taxes in respect of sales and deliveries made therein. This claim, we think, is well-founded; and the judgment below must be reversed.

In three recent cases—*Arlington Hotel Co.* v. *Fant*, 278 U. S. 439, *United States* v. *Unzueta*, 281 U. S. 138, and *Surplus Trading Co.* v. *Cook*, 281 U. S. 647—we have pointed out the consequences of cession by a State to the United States of jurisdiction over lands held by the latter for military purposes. Considering these opinions, it seems plain that by the Act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio—put that area beyond the field of operation of her laws. Accordingly, her Legislature could not lay a tax upon transactions begun and concluded therein.

Arlington Hotel Company v. *Fant*, 278 U. S. 439, denied the power of Arkansas by legislation to modify the liability of innkeepers within a reservation ceded by her to the United States.

United States v. *Unzueta,* 281 U. S. 138, affirmed the exclusive jurisdiction of the United States over crimes committed within a reservation lying within Nebraska. Jurisdiction had been ceded by the State.

Surplus Trading Co. v. *Cook,* 281 U. S. 647, ruled that land within Arkansas purchased by the United States for military purposes with the State's consent was under their exclusive jurisdiction. Private personal property therein was declared not subject to taxation by the State.

The principle approved in those cases applies here. A State can not legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States.

The judgment of the Supreme Court must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.